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## Procedural Reform in the Unemployment Insurance System


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# PROCEDURAL REFORM IN THE UNEMPLOYMENT INSURANCE SYSTEM

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Marla D. Clark\*  
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## INTRODUCTION

In the 1990s, we have witnessed a political movement toward smaller government and reduced federal funding for social benefits programs.<sup>1</sup> At the same time, evidence suggests that the unemployment insurance (UI) system as it works today still may not benefit all of its intended recipients.<sup>2</sup> The need for improved UI services and the scarcity of resources available to meet this need create a tension between political pressures and considerations of fairness and due process. While constitutional considerations always override political pressures, the real issue is where to strike the appropriate balance between fundamental fairness and economic reality.

## I. LEGAL BOUNDARIES

Under the Fifth and Fourteenth Amendments to the United States Constitution, the State may not deprive an individual of life, liberty, or property without due process of law. In any

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1. See, e.g., Janet Hook, *House GOP Begins Drive to Slash Social Spending*, L.A. TIMES, July 28, 1995, at A1; Barbara Vobejda, *GOP Outlines Broad Welfare Reform*, WASH. POST, Jan. 7, 1995, at A1.

2. E.g., WALTER CORSON & WALTER NICHOLSON, AN EXAMINATION OF DECLINING UI CLAIMS DURING THE 1980S 1 (1988); Maurice Emsellem & Monica Halas, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, 29 U. MICH. J.L. REF. 289 (1996); Mary K. Gillespie & Cynthia G. Schneider, *Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs? The Need for Bilingual Services*, 29 U. MICH. J.L. REF. 333 (1996).

due process analysis, a court must determine first whether life, liberty, or property is at stake and, if so, what measures should be taken to provide due process protections for the interest in question.<sup>3</sup>

Whereas the Constitution may set the foundations of procedural due process in UI adjudication, the federal statutory scheme draws the basic blueprints around which the structure shall be built. The procedural specifications in the master plan, as it currently reads, are rather loose. The Social Security Act requires only that a state's UI scheme be "reasonably calculated to insure full payment of unemployment compensation when due"<sup>4</sup> and that the state provide an "[o]ppportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied."<sup>5</sup>

Some might argue that, in fact, the specifications are so vague as not to provide a coherent plan at all. What, after all, is a "fair hearing"? What is a scheme that is "reasonably calculated" to provide full payment of unemployment compensation "when due"? Absent any other explicit requirement, these questions fall back on the traditional inquiries established by *Goldberg v. Kelly*<sup>6</sup> and by the *Mathews v. Eldridge*<sup>7</sup> balancing test, with state law filling in the contours.<sup>8</sup> States decide what procedural safeguards to provide, what kind of hearing to hold, and what method of adjudication to apply. As long as their programs meet basic requirements of due process, the United States Secretary of Labor certifies the plan for payment of federal funds.<sup>9</sup>

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3. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.3 (3d ed. 1994).

4. 42 U.S.C. § 503(a)(1) (1994).

5. *Id.* § 503(a)(3).

6. 397 U.S. 254 (1970).

7. 424 U.S. 319 (1976).

8. *See, e.g., Ross v. Horn*, 598 F.2d 1312, 1318 n.4 (3d Cir. 1979) (noting that the constitutional standard of due process and the requirements of the fair hearing provision of 42 U.S.C. § 503(a) are "co-extensive"), *cert. denied*, 448 U.S. 906 (1980); *Camacho v. Bowling*, 562 F. Supp. 1012, 1020 (N.D. Ill. 1983) ("Thus, if the court finds that the appeals process violates procedural due process, it follows that the appeals process also violates Section 503(a)(3).").

9. *See* 42 U.S.C. § 503(a). Note that the state's law also must comply with additional requirements in the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1994), as discussed elsewhere in this Symposium. *See, e.g., Maribeth Wilt-Seibert, Unemployment Compensation for Employees of Educational Institutions: How State*

## II. WHAT PROCESS IS DUE?

Although it has not always been the case,<sup>10</sup> since 1970, the Supreme Court has established that many statutory welfare benefits, including unemployment compensation, are property rights protected by the Due Process Clause.<sup>11</sup> Since that time, the central debate has focused on the issue of how much process is due.<sup>12</sup>

Any procedural reforms to unemployment insurance administration must aspire to create a system that is efficient, fair, and satisfying to the parties involved. In deciding which procedures to implement, policymakers may choose between taking a categorical approach, which sets a blanket of procedures in all claims, and taking a balancing approach, which weighs the costs and benefits of requiring particular procedures.

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*Courts Have Created Variations on Federally Mandated Statutory Language*, 29 U. MICH. J.L. REF. 585, 587–89 (1996).

A state's program also must fulfill another due process requirement: to provide timely determination of appeals "with the greatest promptness that is administratively feasible." 20 C.F.R. § 650.3 (1995). The United States Department of Labor has established timeliness guidelines regarding how rapidly first-level appeals should be decided, but has set no such standards for second-level appeals. *Id.* § 650.4. One court held that nothing in the statutes or legislative history requires the Secretary to promulgate more explicit standards. *Wilkinson v. Abrams*, 627 F.2d 650, 661–62 (3d Cir. 1980). Should the standard for second-level appeals be made more explicit than merely to require administrative feasibility, or should that determination be left to the states? For a discussion of this issue, see Sharon M. Dietrich & Cynthia L. Rice, *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, 29 U. MICH. J.L. REF. 235, 264–66 (1996).

10. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785–86 (1964) (arguing that government benefits should be rights to be afforded procedural protections).

11. See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (rejecting the traditional distinction between protected rights and unprotected privileges and holding that at least some statutory entitlements are within the scope of due process protections).

12. See, e.g., Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267 (1975); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984); Comment, *Due Process and the Independent Medical Examiner System in the Maine Workers' Compensation Act*, 45 ME. L. REV. 123 (1993); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

### A. Categorical Approaches

A categorical approach to setting appropriate procedures would be rather simple to implement. Policymakers merely would have to impose a set of procedures which people commonly agree tend to result in fair hearings and then apply them to all cases. Although there has been no real agreement as to what procedures would be appropriate, it is instructive here to list some of the ingredients of due process. Judge Friendly has delineated some of the possible elements of judicial due process:

1. An unbiased tribunal
2. Notice of the proposed action and the grounds asserted for it
3. An opportunity to present reasons why the proposed action should not be taken
4. The right to present evidence, including the right to call witnesses
5. The right to know and cross-examine adverse evidence
6. The right to have a decision based only on the evidence presented
7. The right to counsel
8. A requirement that the tribunal prepare a record of the proceeding
9. A requirement that the tribunal prepare a written statement of reasons for the decision<sup>13</sup>

Judge Friendly recognized that the nature and seriousness of the government action would determine the necessity of the listed factors.<sup>14</sup> In some cases, the administrative costs would

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13. Friendly, *supra* note 12, at 1279-92.

14. *Id.* at 1278-79. Moreover, the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), recognized that a pretermination hearing was required before stopping social security payments but that it "need not take the form of a judicial or quasi-judicial trial." *Id.* at 266. The Court required only the following *pretermination* safeguards: an impartial decisionmaker, a right to present argument orally, a right to present evidence orally, a right to confront and cross-examine adverse witnesses, a right to be accompanied by counsel, a decision based solely on the evidence adduced at the hearing, and a statement by the decisionmaker of the reasons for decision and of the hearing evidence relied on. *Id.* at 267-71. Necessary safeguards at a *post-deprivation* hearing would be different. *Id.* at 261.

be an intolerable burden on resources that might have been earmarked for unemployment compensation payments, and the program would be better off with less cumbersome yet still fair procedures.<sup>15</sup> This is only an examination of rudimentary due process requirements. Policymakers may impose greater safeguards if they still perceive unfairness and inaccuracies in the current system.

### B. Balancing Approaches

Rather than using a categorical approach, the Supreme Court generally has applied a balancing test in determining which procedural protections are necessary to provide sufficient due process with regard to withholding government benefits. In *Goldberg v. Kelly*,<sup>16</sup> the Court recognized that the extent of procedural due process that must be afforded is “influenced by the extent to which [the recipient] may be ‘condemned to suffer grievous loss’ . . . and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication.”<sup>17</sup> Likewise, the Court made explicit the elements of the balancing approach in *Mathews v. Eldridge*:<sup>18</sup>

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>19</sup>

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15. See Friendly, *supra* note 12, at 1303–04.

16. 397 U.S. 254 (1970).

17. *Id.* at 263 (citations omitted). The Court held that, before welfare benefits could be terminated, a recipient is entitled to a hearing that includes characteristics found in a judicial trial. *Id.* at 267–71.

18. 424 U.S. 319 (1976).

19. *Id.* at 335. The Court limited *Goldberg* to the particular facts of that case and held that an evidentiary hearing was not required prior to the termination of disability benefits. *Id.* at 349.

### III. APPLYING THE *MATHEWS V. ELDRIDGE* BALANCING TEST TO THE UNEMPLOYMENT INSURANCE SYSTEM

#### A. *Whose Interests Are Affected?*

The *Mathews v. Eldridge* balancing test still applies when examining the adequacy of a given administrative procedure<sup>20</sup> and is, therefore, the appropriate starting point for analyzing new procedural proposals. The first consideration focuses on the private interest that will be affected by official action.<sup>21</sup> The UI system was designed to provide for the payment of insurance benefits to persons who, through no fault of their own, have become unemployed.<sup>22</sup> The system seeks to achieve two main purposes: to prevent these employees from becoming dependent on the welfare system during their search for new jobs and to provide enough temporary income to permit the employees to look for the best possible job opportunities.<sup>23</sup> Unemployment insurance benefit payments begin after an initial determination of eligibility by an interviewer who considers information submitted by the claimant, the claimant's former employer, and others.<sup>24</sup> Because the taxes that an employer must pay into the state's UI fund are indexed to the employer's experience rating,<sup>25</sup> an employer has a substantial

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20. See *id.* at 335.

21. *Id.*

22. See Patricia S. Wall, *A Survey of Unemployment Security Law: Determining Unemployment Compensation Benefits*, 42 LAB. L.J. 179 (1991). Many explanations, such as tight eligibility requirements, are offered for the fact that UI covers very few of those who are unemployed. *Id.* at 179. But Gillespie and Schneider assert that many claimants, especially in areas with high concentrations of non-English-speaking persons, may not receive UI benefits because of their inability to comprehend the complexities of the system. Gillespie & Schneider, *supra* note 2, at 338-42. In fact, according to 1983 statistics, most UI recipients "are disproportionately higher income, prime-aged white males who hold full-time jobs." Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV. 915, 927 (1995).

23. REPORT OF THE COMMITTEE ON ECONOMIC SECURITY 13-14 (1935), reprinted in 50TH ANNIVERSARY EDITION: THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935, at 33-34 (National Conference on Social Welfare ed., 1985); Ronald G. Ehrenberg & Ronald L. Oaxaca, *Unemployment Insurance, Duration of Unemployment, and Subsequent Wage Gain*, 66 AM. ECON. REV. 754, 754 (1976).

24. See Wall, *supra* note 22, at 179.

25. Experience rating is a system designed to force employers to internalize the costs to the UI system that they create. The general idea is that employers who fire or layoff the most employees should be required to contribute the greatest amount of funds to the UI system. See ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, REPORT AND RECOMMENDATIONS 88 (1994).

incentive to challenge claims for unemployment insurance. Thus, the eligibility determination process often involves employers and employees presenting conflicting evidence about the circumstances of the employee's termination from her employment.

### *B. Risk of Error and Value of Other Safeguards*

The second factor in the *Mathews v. Eldridge* balancing test is the risk of erroneous deprivation of a valid UI claim through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.<sup>26</sup> This issue goes to a more general concern for institutional accuracy.

1. *Telephone Hearings*—One of the ways in which the UI systems in some states have responded to growing caseloads and reduced funding is by conducting telephone hearings.<sup>27</sup> Although initially used mainly in cases where claimants or their employers could not readily attend oral hearings, telephone hearings increasingly are used as a way to expedite claims processing.<sup>28</sup> In their Symposium Article, *Due Process Implications of Telephone Hearings*, Allan A. Toubman, Linda Rogers-Tomer, and Tim McArdle suggest that conducting telephone hearings results in reduced rates of claimant representation, non-party witness introduction, document production, and cross-examination.<sup>29</sup> The greater concern, however, is that telephone hearings result in lower claimant success rates, suggesting that the use of telephone hearings leads to erroneous results.<sup>30</sup> Many of the participants in the Symposium questioned the statistical methods used in the study and felt that more research needed to be done before the effect of telephone hearings could be evaluated conclusively.<sup>31</sup> Additionally, some participants suggested that

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26. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

27. Allan A. Toubman et al., *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REF. 407, 414 (1996).

28. *See id.*

29. *Id.* at 449–54.

30. *Id.* at 449, 452.

31. Audience Member, Remarks at Unemployment Compensation: Continuity and Change Symposium Presented by the Advisory Council on Unemployment Compensation and the University of Michigan Journal of Law Reform 312, 314–15 (Mar. 31, 1995) (transcript on file with the *University of Michigan Journal of Law Reform*) [hereinafter Symposium Transcript].



reduced success rates for claimants did not necessarily indicate that telephone hearings were leading to erroneous results.<sup>32</sup> Although telephone hearings may provide a means of reaching greater numbers of claimants, both economic and fairness costs need to be evaluated to determine whether further procedural protections should be implemented.

2. *Representation and Claimant Access*—The most serious indictment of the UI system suggests that claimants are denied effective access to the process. In their Symposium Article, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, Maurice Emsellem and Monica Halas suggest that many claimants do not understand the UI system.<sup>33</sup> The authors assert that increasing the availability of claimant representation would help to equalize the disadvantages that claimants face as they challenge evidence presented by more highly educated and better-funded employers who are usually represented by counsel.<sup>34</sup> Presumably, representation by counsel will aid a participant in any legal proceeding;<sup>35</sup> however, it is less clear that the lack of counsel leads to a greater percentage of erroneous results. Indeed, evidence of greater claimant success when represented by counsel may not necessarily indicate that the system is working better.<sup>36</sup> Although the increased use of counsel may not necessarily lead to better results, if the representation could be provided at little to no cost to the UI system, states should encourage the use of counsel. At the Symposium, Halas contended that their findings indicate that Administrative Law Judges (ALJs) may appreciate the reduced burden of having cases presented by able counsel who are familiar with the system.<sup>37</sup>

In a related Symposium Article, *Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs? The Need for Bilingual Services*, Mary K. Gillespie and Cynthia G. Schneider discuss the problems faced by claimants with limited-English-speaking capacity.<sup>38</sup> Unlike claimants

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32. *Id.* at 314.

33. See Emsellem & Halas, *supra* note 2, at 297–98.

34. *Id.* at 294–97.

35. *Id.* at 292.

36. James L. Pflasterer, Symposium Transcript, *supra* note 31, at 370–72. “[A] lawyer’s more likely to not go forward with an employee’s case if it doesn’t have merit . . . .” *Id.* at 371–72.

37. Monica Halas, Symposium Transcript, *supra* note 31, at 335–36.

38. Gillespie & Schneider, *supra* note 2.

who may be somewhat disadvantaged by a lack of legal representation, claimants who do not speak English may be completely denied access to the system in geographic areas with inadequate bilingual services.<sup>39</sup> Gillespie and Schneider propose that local UI offices in areas with a high percentage of limited English-speaking residents offer bilingual services, including bilingual staff, bilingual forms, and interpreters at hearings.<sup>40</sup> Perhaps more than any of the other issues presented in this section of the Symposium, the problem of bilingual services highlights the difficult balance between fairness and economic concerns. Clearly, a hearing cannot be fair if a claimant cannot read the notice, does not understand the proceedings, or is unable effectively to articulate her claim. Equally evident is the enormous cost of providing comprehensive bilingual services.

Symposium participants were generally sympathetic to these problems, but they were concerned that the statistics showing reduced eligibility rates for non-English-speaking claimants could have many explanations.<sup>41</sup> There was much support, especially from an economic perspective, for the inclusion of "tag lines" on official forms mailed out to claimants; however, the use of comprehensive bilingual services was generally seen as too costly.<sup>42</sup>

3. *Adversarial Versus Inquisitorial Processes*—Many of the calls for expanded procedural safeguards assume an adversarial proceeding. In *Torquemada and Unemployment Compensation Appeals*, William W. Milligan approaches the question from the opposite view that unemployment compensation hearings are inquisitorial in nature.<sup>43</sup> He contrasts high-volume unemployment compensation hearings with hearings by administrative agencies that have low-volume caseloads, noting that these other agencies conduct proceedings which may be characterized as more adversarial.<sup>44</sup>

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39. *Id.* at 333–34.

40. *Id.* at 379–86.

41. James L. Pflasterer, Symposium Transcript, *supra* note 31, at 365.

42. *Id.* at 367; Neal Young, Symposium Transcript, *supra* note 31, at 378. Tag lines warn, in several different languages, that the document received is important and that the recipients should make sure that they understand its contents. See Gillespie & Schneider, *supra* note 2, at 347.

43. William W. Milligan, *Essay: Torquemada and Unemployment Compensation Appeals*, 29 U. MICH. J.L. REF. 389, 392–93 (1996).

44. *Id.* at 394. Robert L. Harvey, Chairman of the California Unemployment Insurance Appeals Board, also noted: "[W]hy are we expected to do in forty-five

Milligan concludes that we should recognize the unique nature of the unemployment compensation adjudicatory format and frame reforms accordingly, rather than provide procedures that may not be tailored to an inquisitorial forum.<sup>45</sup>

The essential question in deciding whether to use an inquisitorial or an adversarial approach to UI hearings revolves around who should control the proceedings and the evidence—the parties or the ALJ.<sup>46</sup> If a reform proposes a procedure geared toward a more adversarial resolution, the *Mathews v. Eldridge* test would first examine the risk that an ALJ acting under an inquisitorial regime will decide a case erroneously and then would compare the benefit of a more adversarial approach that removes control over the proceedings from the ALJ to the parties.<sup>47</sup>

A possible method of determining ALJ accuracy would be to examine reversal rates. It is important to note, however, that aggregated reversal rates do not in themselves show accuracy.<sup>48</sup> Furthermore, a reversal of an ALJ determination does not mean that the determination was incorrect. Indeed, cases before an ALJ are more likely to involve highly subjective matters, such as voluntary quits for good cause and willful misconduct, rather than more objective matters, such as

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minutes what most other adjudication forums allocate days or weeks [to do]?" Robert L. Harvey, Symposium Transcript, *supra* note 31, at 306–07. Harvey suggested that although the current procedural system sacrifices quality for volume, it "provid[es] amazing quality and . . . [is] probably the best adjudicating bargain in the world." *Id.* at 310.

45. See Milligan, *supra* note 43, at 405.

46. We will refer to the actor who reviews the decisions of the initial claims officer as an Administrative Law Judge, while acknowledging that many states entitle them "referee" or "hearing officer."

47. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that the balancing test examines the erroneous deprivation of a private interest through procedures used only after first examining the private interest affected by the official action).

48. For example, the Pennsylvania Unemployment Compensation Board of Review reversed approximately 18% of the claims brought before it in 1995. Memorandum from Clifford F. Blaze, Deputy Chief Counsel, Unemployment Compensation Board of Review, Pennsylvania Department of Labor and Industry, to Jesse S. Reyes, Executive Editor, *University of Michigan Journal of Law Reform* 2 (Jan. 31, 1996) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter Blaze Memorandum]. This does not necessarily mean that 18% of the Referee decisions were erroneous, but only that, of the determinations *taken to appeal* before the Board, only 18% were decided differently on the same facts. In fact, claimants and employers appealed only 22% of Referee decisions. *Id.* Supposing that the other 78%, who did not appeal, correctly self-dismissed their cases as lacking merit—but recognizing that this supposition may not be entirely correct—then Referees decided "incorrectly" in only approximately 4% of their determinations.

monetary eligibility, which are weeded out at the initial claims office determination. Thus, because the ALJ must make a yes-or-no decision on issues that could lie anywhere on a spectrum,<sup>49</sup> accuracy as a criterion is not available in the objective sense. A proxy for an ALJ's accuracy would be to compare ALJ decisions for consistency.<sup>50</sup>

As for moving evidentiary control from the ALJ to the parties, an objection to the current judge-centered approach is that the ALJ may not be able to maintain impartiality. When the ALJ must elicit all of the evidence, he is forced to wear three hats, that of impartial judge, advocate for the claimant, and advocate for the former employer. Likewise, if a claimant is unrepresented by counsel, the ALJ must aid the claimant in presenting her case because the ALJ has a duty to develop all of the relevant facts.<sup>51</sup>

### C. Government's Interest

The third factor of the *Mathews v. Eldridge* balancing test is the government's interest, including the function involved and the fiscal and administrative burdens of additional or substituted procedural requirements.<sup>52</sup> Although cost alone should not be dispositive of this issue,<sup>53</sup> the query must inevitably consider the scarcity of fiscal and administrative resources.

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49. DAVIS & PIERCE, *supra* note 3, § 9.10. "The ALJ can hope to do little more than draw a line on the . . . spectrum and use her judgment to determine on which side of the line individual cases fall." *Id.*

50. *Id.* To evaluate consistency, we would need to examine how widely disparate the individual ALJ's reversal rates are from the mean reversal rate. *See id.* Thus, if the mean reversal rate is 50%, the goal should be for individual ALJs to maintain reversal rates between 40% and 60%. *Id.*

51. *See* Jerry L. Mashaw, *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*, 59 CORNELL L. REV. 772, 787 (1974). The Supreme Court has rejected the multiple-hats challenge to ALJ inquisitorial adjudication. *See Richardson v. Perales*, 402 U.S. 389, 410 (1971).

52. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

53. *Id.*

The use of telephone hearings seems to be a direct response to the administrative burden of conducting in-person hearings. As a matter of conserving administrative resources, however, no evidence was presented at the Symposium to determine whether the cost of teleconferencing is less than the cost of "live" hearings.

Likewise, the increased use of legal representation, as long as it is not provided by the government, could lead to tremendous savings to the UI system by reducing the number of meritless appeals and by streamlining procedural aspects of the hearings. Requiring the government to provide legal representation to claimants, however, would not be a likely alternative and would impose tremendous costs on the system.<sup>54</sup>

Increasing the availability of bilingual services would impose similar costs on the UI system; however, the complete barrier to access for non-English-speaking claimants presents a far more disturbing challenge to the fairness of the UI process. Although government-provided interpreters and bilingual staff may prove to be economically infeasible, the use of tag lines and bilingual forms appears to be a reasonable and inexpensive alternative to address the problem of claimant access.

#### IV. TIMELINESS AND TRADE-OFFS

Unemployment insurance adjudication is a high-volume undertaking, requiring a case management approach that is different from a fully adversarial process.<sup>55</sup> Because of the pressures involved in the mass administration of justice, the system is in perpetual danger of falling behind in claims processing. In *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, Sharon M. Dietrich and Cynthia L. Rice call attention to this latest "crisis" in appeals processing which arose out of the recessionary period of 1989 to 1993.<sup>56</sup> One of the discussants at the Symposium suggested, however, that this problem has

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54. Mashaw, *supra* note 51, at 789.

55. *See id.* at 787-88.

56. Dietrich & Rice, *supra* note 9, at 237, 242-47.

always existed.<sup>57</sup> Perhaps the timeliness issue has only recently become salient because of the political trend towards reducing the size of government.<sup>58</sup> At any rate, the participants at the Symposium agreed that achieving timeliness in appeals processing is currently a permanent problem, but disagreed as to the appropriate solution.<sup>59</sup>

Timeliness, of course, is an essential element of procedural due process. Without a timely determination of the claim, the state effectively deprives the UI claimant, who appeals a denial at the initial determination level or a reversal of benefits at the ALJ level, of a statutorily defined property right.<sup>60</sup> The claimant's interests in timely benefits payments are grave and cannot be remedied completely by payment at a later time.

On the other side of the balance is the government's interest in tolerating delayed payments. Arguably, erroneous determinations in favor of claimants cause an unfair charge against a state's UI trust fund. The Supreme Court in *California Department of Human Resources Development v. Java*,<sup>61</sup> however, suggested that the state could recover these erroneous payments by offsets against future claims for benefits or by civil action.<sup>62</sup> The inquiry implicates the main government interests of the cost and feasibility of administration. Unemployment insurance programs are being squeezed by cutbacks in funding, leading to the eternal debate of quantity versus quality.<sup>63</sup> Participants at the Symposium suggested that states currently use certain unnecessary procedures and practices that could be eliminated without sacrificing quality.<sup>64</sup>

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57. Melvin J. Bright, Symposium Transcript, *supra* note 31, at 451 ("The problems of appeals promptness have been around since . . . sometime shortly after 1935. I suspect, to the extent that I'm able to predict the future, they'll still be here sometime around 2035.")

58. See *supra* note 1 and accompanying text.

59. See, e.g., Melvin J. Bright, Symposium Transcript, *supra* note 31, at 453 (noting the lack of a model that improves upon the UI system); Edward J. Schoenbaum, Symposium Transcript, *supra* note 31, at 457 (describing an ABA proposal for judicial timeliness that would probably be unacceptable in the UI context); Audience Member, Symposium Transcript, *supra* note 31, at 472–73 (arguing contrary to Dietrich and Rice and in favor of less federal control).

60. *Mathews v. Eldridge*, 424 U.S. 319, 341–42 (1976).

61. 402 U.S. 121 (1971).

62. *Id.* at 129 n.8 (1971).

63. See *supra* note 44.

64. For example, Edward J. Schoenbaum, President of the National Association of Administrative Law Judges, suggested that case docketing practices could be improved

The crucial question in the balance is "what is the risk of erroneous deprivation?" Whether the delay really deprives claimants of a legitimate property right depends upon whether the initial determinations are accurate. Before a state employment security agency makes a determination as to eligibility, two groups comprise the universe of claimants: those who *a priori* are entitled to benefits and those who *a priori* are not.<sup>65</sup>

After the initial determination, there are four groups of claimants: (1) those who have been granted benefits properly; (2) those who have been granted benefits improperly; (3) those who have been denied benefits improperly; and (4) those who have been denied benefits properly. Claimants in Groups (1) and (4) are, of course, not harmed by delay in appeals determinations. Claimants in Group (3) are false negatives. These are the claimants who must go through the hardships of unemployment and the difficulties of finding re-employment without the temporary aid of UI insurance while their claims are pending. It is not obvious that delay harms claimants in Group (2). They are the false positives. Arguably, claimants in Group (2) are not harmed, because they receive a benefit to which they are not entitled. Yet receiving undeserved benefits still harms them if they alter their behavior in reasonable reliance upon receiving the replacement income and later must pay it back.<sup>66</sup>

As a programmatic matter, should we be more concerned with the false positives or with the false negatives?<sup>67</sup> Perhaps the UI program should be more concerned with the false negatives than the false positives, because erroneous denial of benefits creates a harm that cannot be completely remedied *ex*

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by tightening requirements before ALJs may grant continuances in cases rather than allowing cases to remain on continuance for an indeterminate time. Edward J. Schoenbaum, Symposium Transcript, *supra* note 31, at 467-68. Schoenbaum also suggested dispensing with the practice of transcribing tapes of the hearings because the reviewing board could always listen to the tapes instead. *Id.* at 469.

65. Cf. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 84 (1983) (comparing the social costs of misidentifying whether a social security claimant "really" meets the statutory standards).

66. For example, while receiving these payments, a claimant might be induced to remain out of the workplace longer in order to find more suitable work. This worker might be worse off when the state garnishes this unforeseen debt from his wages, whereas, had he known that this "income" was not really available to him, he would have been more likely to take a job immediately without incurring this debt.

67. Cf. MASHAW, *supra* note 65, at 84-85 (noting that attempts to eliminate one type of error will lead to more of the opposite type of error).

post.<sup>68</sup> Although these claimants ultimately receive the statutorily defined benefits, they have had to endure the hardships of unemployment without contemporaneous assistance, a pain for which they are not compensated.<sup>69</sup> Setting priority to claimants' appeals may also be justified on risk distribution principles. Individuals are less able to absorb the risk of loss than are larger employers or socialized risk-spreading institutions such as the UI system.<sup>70</sup>

## CONCLUSION

Shrinking budgets force hard choices of resource allocation and trade-offs between efficiency, fairness, and timeliness. The reforms that should be implemented depend upon the policymaker's view of the proper nature of the UI proceeding—adversarial or inquisitorial—and of where the inaccuracies or errors in the system lie. If the inaccuracies lie earlier in the process, we should target more resources to that stage in order to reduce the number of appeals that burden the system.<sup>71</sup>

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68. *But cf. id.* at 85 (concluding that neither error is more costly in determinations of disability benefits).

69. Dietrich and Rice argue that claimants' appeals should be prioritized when a backlog of appeals has developed that will require some time to resolve. Dietrich & Rice, *supra* note 9, at 270. Under our analysis here, however, we note that some of the claimants who appeal might be in Group (4). Yet this fact does not detract from the proposal, because claimants in that group will simply find out sooner that they are not entitled to benefits. Employers who appeal are not harmed by the delay because their experience ratings are not charged until the determination is final. There may be a harm to Group (2) claimants, but because the extent to which they rely upon the UI payments is unknown, we should target our resources at the known harm of delay, which is the harm to those who are improperly denied benefits.

70. *Cf. James M. Klein & Thomas E. Willging, Beyond Java: Redistribution of Risks in the Administration of Unemployment Insurance*, 24 CASE W. RES. L. REV. 490, 514–18 (1973) (proposing a presumption of eligibility for claimants who meet monetary requirements and present nonfrivolous appeals). Klein and Willging propose that claimants receive payments immediately upon appeal until the state makes a final determination as to eligibility, on the grounds that “[t]he low-income, low-asset claimant does not have sufficient reserves to absorb the cost of delay.” *Id.* at 500. Although the claimant appeal docketing priority proposal would not go as far as the Klein and Willging suggestion, the same principle of risk allocation applies.

71. *See, e.g., id.* at 519 (proposing a reallocation of resources toward the initial determinations in order to improve accuracy at the earliest point in time). If a state targets resources earlier in the process, fewer appeals would burden the system downstream. Naturally, this also raises the issue of cost-effectiveness. Claims examiners at the initial determination level in Pennsylvania made over one million determinations in 1995. Referees decided approximately 54,000 appeals, while the



The proposed reforms of providing legal representation to claimants,<sup>72</sup> providing bilingual services for non-English-speaking claimants,<sup>73</sup> or limiting the use of telephonic hearings<sup>74</sup> all come at a cost of reducing the funding available to other parts of the system.<sup>75</sup> Additionally, providing more control to parties in presenting their claims—or in defending against claims—is an adversarial mechanism that tends to slow the pace of adjudication,<sup>76</sup> thus heightening our concerns about timely adjudications.<sup>77</sup>

These proposals purportedly would provide fairer results in claims determinations where claimants have not been capable of sufficiently presenting their claims.<sup>78</sup> In addition, if there is at least an atmosphere of fairness, regardless of whether the determination was accurate, claimants and employers may be more satisfied with the results.<sup>79</sup> Perhaps participant satisfaction is the unifying goal that resolves the conflicts among efficiency, fairness, and timeliness. As one Symposium participant noted, "At the end of the hearing . . . [the parties should] feel that they have not been precluded from having their day in court and having some sense of the procedure and a fairness in the whole process."<sup>80</sup>

The Articles that follow suggest several procedural measures through which the UI system can be improved to provide greater protections to its intended beneficiaries. We believe

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Unemployment Compensation Board of Review decided approximately 12,000 appeals, of which only 1105 were appealed to the Commonwealth Court. Blaze Memorandum, *supra* note 48, at 3-4. Pennsylvania may find cost-effective improvements in the dockets by targeting more resources at the referee level and reducing the number of appeals downstream, but might not find any improvement by spreading the same resources among one million determinations at the first level.

72. Emsellem & Halas, *supra* note 2, at 320-31.

73. Gillespie & Schneider, *supra* note 2, at 379-86.

74. Toubman et al., *supra* note 27, at 457-58.

75. *Cf.* DAVIS & PIERCE, *supra* note 3, § 9.11 (noting the increased costs of permitting claimants to cross-examine medical experts who testify in Social Security Administration hearings and suggesting that the practice adversely affects accuracy).

76. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 34-35 (1984).

77. See Dietrich & Rice, *supra* note 9.

78. See, e.g., LANDSMAN, *supra* note 76, at 45 (asserting that adversarial process and effective advocacy serve to protect parties at an initial disadvantage).

79. Willard Z. Carr, a labor relations and employment law attorney who participated in the Symposium, suggested that the ALJ should humor the parties' desire to present evidence that could be irrelevant or technically inadmissible, whether or not the evidence is actually relied upon, to give the parties "the sense that the hearing officer is really listening to them, really cares about what they are saying." Willard Z. Carr, Symposium Transcript, *supra* note 31, at 294.

80. *Id.* at 295.

that the suggested reforms will provide future UI policy-makers with a useful starting point for further study and discussion.

