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A WORKING PAPER

PREPARED FOR THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

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PREPARED BY

Legal Research and Services for the Elderly,
National Council of Senior Citizens, Inc.

LETTER OF TRANSMITTAL

JULY 16, 1970.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Special Committee on Aging,
U.S. Senate, Washington, D.C.

DEAR SENATOR WILLIAMS: In response to your request we take pleasure in submitting this report on some of the legal problems affecting the elderly.

For nearly 2 years the National Council of Senior Citizens has sponsored a research-demonstration program funded by a grant from the Office of Economic Opportunity. We have worked on 12 projects in ten cities throughout the country. Eleven of the projects have conducted research and provided services in specific problem areas. One project has provided research and technical assistance.

The objective has been identification of legal issues affecting the elderly poor and the development of solutions. A long-range goal has been to demonstrate how OEO-funded legal programs and the private bar can better serve the 20 million Americans over 65 and the millions more who are approaching that age. In particular, we seek to serve those who are not only aged but have the disadvantage of being poor.

LRSE projects have been active in the areas of health care, housing, advocacy training, probate reform, protective services, economic development, and Federal benefit programs.

This report has been prepared by our LRSE staff with special papers from some of the lawyers working on demonstration projects. Their views do not necessarily reflect the views of the National Council of Senior Citizens.

We are indebted to the Office of Economic Opportunity for furnishing us this opportunity to examine the issues, to involve some of the finest legal talent in the country, and to develop plans for legal reform. We are grateful for the interest of the U.S. Senate Special Committee on Aging and hope that this report—though limited to just a few of the areas in which we have been working—will contribute to increased concern regarding the legal problems of the elderly.

Sincerely,

WILLIAM R. HUTTON,
Executive Director,
National Council of Senior Citizens.

PREFACE

". . . the only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and as people strong enough and well enough informed to maintain its sovereign control over its government."

—Franklin Delano Roosevelt.

Law is one instrument by which government serves humanity. If, however, law is misconstrued or mismanaged, it becomes tyrant instead of servant.

Few would argue with the sentiments expressed above. And yet, every member of the Congress of the United States receives complaints daily from citizens who say that fundamental rights, or benefits due them under law, are denied to them.

"Due process" may be subverted. "Equal protection" may be out of reach.

An applicant for public housing, for example, may find himself passed over in favor of others who have not waited as long. An immigrant, trying to become a citizen, may believe he is capriciously denied that status. An older person, forced to retire because of ill health, may feel that investigators invade his privacy unnecessarily to determine old age assistance eligibility. Neighborhood residents in a renewal site may argue that the letter and the spirit of relocation statutes are overriden by Federal or local officials. A veteran, seriously ill, may write in utter desperation, not knowing that help can be had at a nearby Veterans' Administration office.

We in Congress do our best when complaints are valid. We devote much time and effort to "case work."

But even as we do, we may be painfully aware that we are helping only the most articulate and persistent persons in need of help.

We know that for each letter we receive, hundreds or thousands of other persons may face similar problems.

But they do not write. They accept injustice or do not even know that injustice exists. Statutes defy interpretation. Officials sometimes seem to have answers ready even before questions are asked. "You can't fight city hall" is a common saying, even yet. How on earth, then, can the average citizen fight a Federal establishment which—despite the honest and often valiant work of public servants throughout government—often gives the appearance of bureaucratic unresponsiveness.

To that question, there can be only one response. Citizens *must* maintain control of those meant to serve them, *and government itself should strengthen such control:*

—By providing facts to the public.

—By impartial and sensitive implementation of the law.

—By submitting to review or appeal when responsibly challenged.

Older Americans, in particular, stand in need of fair, sympathetic treatment in their dealings with government.

Retirement, after all, can be the most difficult adjustment made in a lifetime.

Not only must the retiree live on an income averaging less than half for those still in the work force, he must define new roles for himself in life. And, even though he may rarely have dealt with government agencies before—except to pay taxes—he now finds himself personally involved in intricate and sometimes baffling encounters with Federal programs. He may spend hours in a Social Security office trying to understand "technicalities" which could deny him precious dollars every month. Paperwork under Medicare and Medicaid may be incomprehensible or onerous. If he is one of the two million Americans dependent upon Old Age Assistance, the welfare office may seem to be a forbidding citadel rather than a headquarters for service and understanding.

Stubborn misconceptions about the elderly and their needs also have their effect. The Columbia Center for Legal Problems of the Elderly[1] has criticized the "mistaken and aggressive steps that the government and public agencies take which deprive the elderly of freedom of choice and action."

Under that category, the Center gives these examples:

> People are often put into hospitals, hospitals which often resemble jails. People have committees appointed for them to run their money affairs . . . There is often a bias in favor of institutions rather than individual attention in the home. Actual treatment inside institutions often is merely preservation of life rather than a proper way to make people enjoy an active and fulfilling period of time.

Implicit in this critique is recognition of the widespread—and perhaps subconscious—attitude that the retiree "has lived his lifetime," and that priority should be placed elsewhere. Morally indefensible as this notion is, it is also unrealistic. More Americans are spending more years in retirement. They are not satisfied with old cliches and a welfare image. Their retirement years should not be wasted or blighted. Those years are a national asset of great value to *all* people in this land.

Aging, even before retirement, can bring citizens into contact with government. They may futilely protest alleged violations of the Age Discrimination in Employment Act. They may question pension plan rulings. They may wish to challenge policies which force early retirement upon them. They may be so-called "older workers"—men and women past age 45—who seek retraining when jobs are wiped out. They may seek disability payments long before their sixty-fifth birthdays.

Oftentimes, the citizen may exhaust whatever appeals there may be to regulatory justice. He may then take the case to court. And there, he may encounter other complexities.

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[1] See Appendix C, p. 57, for additional details on the Center.

Perhaps most elderly persons in the United States today escape such difficulties. If perplexity arises, they can receive valuable assistance in many a Social Security office and in other agencies. We can hope that more problems are resolved than are not.

But there is far too much evidence that large numbers of older Americans suffer needless anxiety, deprivation and injustice simply because they do not know what help is available to them, or because of wrong-headed decisions made arbitrarily by representatives of government.

That evidence has been provided in part at hearings before this Committee and other units of the Congress. Another source of information was established 2 years ago when the Office of Economic Opportunity established a Legal Research and Services for the Elderly program under the sponsorship of the National Council of Senior Citizens.

Project directors for LRSE are the major contributors to this document. Carefully, they have informed the Committee that they do not yet have all the documentation or experience needed for final conclusions on many of the issues discussed on the following pages. Their recommendations do not necessarily reflect the views of this committee.

But from their experience thus far, there is much to be learned. They and their associates must sometimes play the role of gadfly, but more often they are fact-finders who explore the confrontation of people and government in problem areas.

The Senate Committee on Aging is grateful to the National Council, the OEO, the LRSE directors, and to the authors of individual papers. They have made it possible for the Committee to publish a document which should receive careful attention at several levels:

—Congress should consider new laws, or the revision of old laws to help overcome difficulties described in this study.

—Federal, State, and local administrators of any program with the elderly should heed the factual evidence and suggestions which follow.

—Members of the legal profession will find much useful information which will be of use for them as advocates for aging and aged Americans.

—And finally, individual citizens of all ages should ask themselves: Have they unwittingly contributed to the problem simply by not caring about what happens to "the old folks?"

This introductory statement would be incomplete without mention of the fact that the American Bar Association has established a Section Committee on Legal Problems of the Aging. Under the chairmanship of Norman J. Kalcheim of Philadelphia, the ABA Committee is cooperating with the Senate Committee on Aging in arrangements for a hearing to be conducted during the ABA national convention in St. Louis, Missouri, on August 11, 1970.

There, LRSE and ABA representatives will discuss issues raised in this study, as well as others.

This study, and the hearing—it is hoped—will result in greater understanding and responsiveness among lawmakers, government administrators and those who, in the private practice of law—bear formidable responsibilities in daily struggles for principle and justice

Without such responsiveness, there would be little left for us but to bemoan the growth of bureaucracy and the inevitability of injustice.

Our nation—after almost 200 years of existence, with the prospect of abundance and genuine fulfillment in the lives of its citizens within view, despite present tragedies and disruptions—is far too mature to accept defeatism as a way of life. But if we let one person's rights be trampled, we as a people have suffered a defeat. No nation can afford such defeats. No people should be asked to bear them.

HARRISON A. WILLIAMS, Jr.,
Chairman, U.S. Senate Special Committee on Aging.

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INTRODUCTION

(By DAVID H. MARLIN*)

Attention to legal problems of the poor has dramatically increased in recent years with the creation in 1964 of the Legal Services Division of the Office of Economic Opportunity. More than 250 programs have been funded in every State to establish neighborhood law offices convenient to potential clientele. The services are free to those whose low income prevents them from retaining counsel to represent their interests.

Historically, legal assistance furnished by bar association referrals, legal aid agencies, and private practitioners most frequently dealt with problems on a case-by-case basis. OEO, however, has emphasized law reform. The latter undertaking requires the development of legal strategy embracing administrative agency negotiations, litigation, and legislative reform. The targets are "institutions," governmental and private, that unfairly, unnecessarily, and inequitably prevent the poor from improving their circumstances.

Law reform representation is not uncommon to lawyers. Law firms throughout the country, for example, provide specialized skills for the intricate and significant interests of large corporations, many of which operate worldwide. The experience of legal service programs demonstrates that the poor have multiple legal problems. They are entitled, in our system of justice, to the same qualified and thorough representation.

The elderly comprise nearly one in three of all the poor but have received only a tiny fraction of legal services proportionate to their numbers. There are many reasons for this, the chief ones reflecting the timidity and withdrawal that often characterize the elderly and the lack of knowledge and interest in the aged that characterize young lawyers. In fact, the American Bar Association recently established its first committee dealing exclusively with problems of the elderly.

Legal Research and Services for the Elderly was established in July 1968 under the sponsorship of the National Council of Senior Citizens. The grant was funded by the Older Persons Program of the Office of Economic Opportunity to be administered jointly with the Legal Services component. Twelve subgrants were made for the first year of operations. Programs have operated this past year in New York City; Boston; Atlanta; Miami Beach; Morehead, Ky.; Bluefield, W. Va.; Ann Arbor, Mich.; Albuquerque; San Francisco; and Los Angeles.

Legal Research and Services for the Elderly has begun or assisted in approximately 50 lawsuits in its first year ranging over issues in

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Social Security retirement benefits, Social Security disability benefits, old-age assistance, health care and treatment, conservatorships, guardianships, private and public housing, consumer fraud, mental commitment, private pension plans, and economic development. Research has been conducted in the administration of small estates. State Medicaid and consumer education pamphlets have been published.

The chapters that follow were selected to illustrate the scope and objectives of the program.

OLDER AMERICANS IN NEED OF HELP: SOME "CASE STUDIES"

Older Americans do not become different persons when they stop daily work and become full-time or part-time retirees. But, in later years, they may face entirely new problems caused in one way or another by Federal programs meant to be of service to them.

Here, from the records of the Legal Research and Services for the Elderly projects,[1] are a few examples of such problems, together with illustrations of what can be done when trained and responsive personnel are on hand to provide help:

Blind Man Recovers $4,600 in Back Payments.—Many potential recipients of Federal benefits never receive needed assistance, since they are completely unaware of the existence of helpful programs.

Such was the case for a blind Massachusetts man, who was living on Social Security as his sole source of income.

With the help of a legal advocate, he was certified by the Massachusetts Commission on the Blind for assistance under the Aid for the Blind program. His advocate also successfully contended that the client should be entitled to back payments. Recently the elderly blind man received a check for $4,600 in overdue payments. Now, he is in a much better position to pay his rent and discharge his other financial obligations.

Coping with Benefit Programs.—Legal Research for Appalachian Elderly in Bluefield, West Virginia, is attempting to provide essential facts to help elderly clients "maneuver through the different benefit programs . . . to maximize on the benefits they are legally entitled to."

They give this description of the problem:

> Persons in need of medical assistance in many cases may be well advised to minimize or not even apply for Social Security benefits in order to preserve public assistance eligibility and their medical care that is participation in Medicaid. Other needy people do not receive food stamps because they quite understandably will not "spend down" or secrete assets in excess of the maximum assets for food stamp eligibility. Many elderly and disabled persons do not understand the Social Security workmen's compensation offset or the earnings test and do not apply for workmen's compensation or do not work for fear of losing existing benefits.

Individual agencies, such as the Social Security Administration, issue publications meant to assist the elderly, but there is little refer-

[1] See appendix C, p. 57, for additional details on LRSE and the work of projects in the field.

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ence to interrelationships among programs. Appalachian project directors are preparing their own booklets, but they also suggest enactment of "legislation which coordinates different benefit programs and takes the burden off the low income elderly person of (1) understanding the complexities of the law and (2) manipulating within those complexities."

Hope for New Housing.—Santa Monica has nearly 20,000 older persons who—despite the generally beautiful seaside setting of that community—for the most part live in old, and expensive apartments. Years of talk about new housing had led to no tangible results. But, within recent months, HOWSE (Housing Opportunities for the Westside Elderly) attorneys have worked with local businessmen and others to establish a nonprofit housing foundation to construct a 200-unit apartment for older persons. HOWSE also surveyed 4,000 elderly residents to obtain government-required data on the numbers and income of the elderly. HOWSE, in its role as counsel for the foundation, helped secure a $31,000 grant from Urban America, Inc., as seed money for the apartment complex. Without HOWSE, there would be little hope for new housing urgently needed by the older Americans of Santa Monica.

Food Assistance for the Needy Aged.—Enactment of the 15 percent increase in Social Security benefits last December—though welcomed by the Nation's elderly—posed certain problems for persons receiving some form of public assistance.

In Georgia many aged persons discovered that they had become ineligible for surplus food because the Social Security raise pushed their total income above the maximum qualifying level, as established by the State Department of Family and Children's Services.

At the urging of GALA (Golden Age Legal Aid) attorneys, the department agreed to raise the income limitations by $5 for single persons and by a proportionately larger amount for families—enabling 3,000 low-income elderly to receive badly needed food.

Retroactive Disability Benefits for Elderly Widow.—An elderly Georgia widow is back on the road to financial recovery because of successful litigation filed by GALA project attorneys.

In her previous attempt to be certified for Social Security disability benefits, the client's request had been denied by the Appeals Council in the Social Security Administration.

GALA lawyers were not only able to make the widow eligible for future disability benefits but also were successful in recovering retroactive payments for 21 months. These benefits resulted in several hundred dollars for the needy client and helped to pay some of her overdue bills.

No Telephone, No Teeth.—Boston welfare officials denied an elderly welfare recipient's request for false teeth, for no apparent reason. An LRSE legal advocate dug into the case and among other arguments, pointed out that denial of teeth might actually increase public expenditures in the long run. Health can give way among toothless elders; a stay in a nursing home could cost far more than the cost of the dental work. In addition, many older persons become withdrawn and depressed about their appearance when teeth are gone.

Two months passed. The legal advocate prevailed, and then took one more step. He argued successfully for a special telephone allotment.

Finally, the client was hired as an "extra" in a television production. He received about $200 for four days work.

Chance Meeting Helps Public Assistance Recipients.—Today two elderly women in Massachusetts are receiving additional old age assistance payments because of a chance meeting with a legal advocate from the Council of Elders project.

The legal advocate met the applicants at the Welfare Department shortly after their claims had been denied by their social worker.

Within 30 minutes the advocate was successful in having their requests approved. He also argued successfully that their monthly old age assistance payments should be increased from $85 to $114, because they were on special diets. Other urgently needed assistance was also obtained, including special allotments for clothing, a new bed, and a surplus food card.

Further conversation with the social worker revealed that the women might also be eligible for disability assistance. At the request of the advocate, the clients' hospita' forwarded copies of their medical records. Now both receive disability benefits, and their financial position has improved markedly.

Protection Against Deception.—Senior citizens are often lured into renting apartments because of advertised luxuries, such as furnished air conditioning units or refrigerators. But, many have been disappointed after discovering that these comforts are in poor repair or do not work.

In May the Miami Beach City Council passed legislation to strengthen the city's housing code and to protect the aged from this deceptive practice. An amendment—drafted with the help of legal services attorneys—will require landlords to maintain furnished refrigerators and air conditioning units in proper condition for their renters.

Now older tenants—as well as younger persons—can be more assured that advertised luxuries in apartments will be operational.

Making Use of Medicaid.—Benefit programs are of little help to applicants if technical language confuses them beyond comprehension. Particularly disadvantaged are non-English speaking persons.

In January the Columbia Center prepared a concise, readable booklet—*Your Right to Medicaid*—to explain the New York Medicaid law to eligible applicants and administrators of the program. Approximately 5,000 copies have been printed for distribution and have helped many formerly confused individuals. In addition, the booklet is being translated into Spanish for the large number of Spanish-speaking persons in New York City.

The Center has also offered assistance to other persons who wish to prepare pamphlets explaining the Medicaid programs in their States.

Lengthy Residence Requirements Invalidated.—Another service provided by LRSE attorneys is to assist legal services and private lawyers representing the elderly poor.

For example, the Columbia Center has aided attorneys in four different States in challenging the constitutionality of lengthy residence requirements—ranging from 10 to 25 years—to be eligible for old age and other public assistance benefits.

One such case involves an elderly Arizona woman who has been

denied benefits under the Aid for the Permanently and Totally Disabled program, even though she has resided in the State for 13 years. An amicus curiae brief was filed by the Center before a three-judge panel in the Federal District Court. In May the Court ruled in favor of the plaintiff, stating that the Arizona 15-year residency requirement violates the equal protection clause of the Fourteenth Amendment.

Rent Control Litigation.—Prohibitive property taxes and rising rents have placed many aged persons in a "no-man's land" with regard to housing.

In Miami Beach several senior citizens organizations began an intensive drive for rent control legislation to protect persons living on limited, fixed incomes. LRSE attorneys represented these groups in hearings before the City Council. Last fall the Council adopted a rent control ordinance, as drafted by project lawyers.

This ordinance, however, was later voided because the Council failed to have the required number of readings for formal enactment of the legislation.

In February the City adopted an identical ordinance, but its validity is being challenged. LRSE is providing assistance to the City of Miami Beach in the appellate proceedings.

Involuntary Transfer of Aged Mental Patients.—LRSE attorneys for the Columbia Center and the Washington office have filed an amicus curiae memorandum in a Washington, D.C. case with potentially far-reaching implications for the Nation's elderly.

The suit challenges the constitutionality of the District statute permitting involuntary transfer of patients committed to St. Elizabeth's Hospital to previous jurisdictions because they did not reside in Washington for one year prior to commitment. This class action is particularly important for elderly geriatric patients because their occupancy in mental hospitals is substantially larger than for all other age groups.

Geriatric patients in mental hospitals now occupy about one out of every five hospital beds of all descriptions in the country. In the amicus memorandum, LRSE lawyers emphasized, "These persons are the principal victims of laws unconstitutionally depriving mentally ill persons of their legal rights."

CHAPTER ONE

THE "RIGHT" TO FEDERAL BENEFIT PROGRAMS

(By James A. Kraus and Mark A. Wurm *)

The social welfare policy of the United States is a product of our rapid industrialization and the periodic depressions that ravaged the country's economic stability. The Social Security Act of 1935, the foundation of Federal support, was enacted to provide a defense against economic insecurity as well as benefits and services to the needy.

President Franklin D. Roosevelt described the Act as:

> A cornerstone in a structure which is being built, but is by no means complete—a structure intended to lessen the force of possible future depressions, to act as a protection to future administrations of the government against the necessity of going deeply into debt to furnish relief to the needy—a law to flatten out the peaks and valleys of deflation and of inflation—in other words, a law that will take care of human needs and at the same time provide for the United States an economic structure of vastly greater soundness.

Today, Social Security payments exceed $30 billion a year, about four percent of the Gross National Product. The release each month of billions of dollars to millions of beneficiaries has a significant impact on the nation's economy.

Health insurance for the elderly was added in 1965. Medicare expenditures are estimated today at $7 billion annually, a meaningful cushion to the health costs of old age.

Public assistance for the aged, blind and disabled was incorporated into the Act as a Federal-State cooperative grant-in-aid program based on a means test. Unlike the Social Security trust fund, welfare grants are funded from general revenues. The administration of public assistance, which has differed substantially from State to State, has precipitated numerous challenges by OEO-funded lawyers.

Federal benefit programs—though designed to aid elderly individuals—frequently produce a myriad of complex legal problems which completely overwhelm the untrained layman. Oftentimes their legal and equitable needs receive inadequate attention because of

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The views of the authors do not necessarily reflect the policy of the Center on Social Welfare Policy and Law, Columbia University.

the difficulty in obtaining competent counsel to represent their interest. Too often their legal problems become bogged down in a legal morass of lengthy delays and intricate procedures.

I. THE BENEFIT PROGRAM: PURPOSES

Old-Age, Survivors, and Disability Insurance (OASDI), commonly referred to as Social Security, is provided for in Title II of the Social Security Act. OASDI pays monthly benefits to retired and disabled workers, their dependents, and to the survivors of deceased workers. Qualification for benefits is conditioned on a worker having attained the required number of quarters of coverage—a calendar quarter in which he was paid a sufficient amount to have the payroll tax, which supports the programs, deducted from his wages. The amount of benefits received monthly depends on the average monthly earnings of an eligible worker during a period of years provided for in the Act. Eligibility for retirement benefits requires attainment of at least age sixty-two, the filing of an application, and sufficient quarters of coverage. OASDI is administered directly by the Federal government.

Veterans' benefits are provided to disabled veterans, their dependents, and to the survivors of veterans. The program is federally administered and financed.

Old-Age Assistance (OAA), Aid to the Blind (AB), and Aid to the Permanently and Totally Disabled (APTD), are adult categorical assistance programs, provided for in Title I, Title X, and Title XIV, respectively, of the Social Security Act. The Social Security Act contains minimum Federal requirements for each of these programs which States must comply with in order to continue receiving Federal funds to partially cover State expenditures. Administration is carried out by each participating State; consequently, eligibility requirements, benefit levels, and other aspects of the programs vary widely from State to State. OAA provides grants to elderly persons who have insufficient income to satisfy their needs, as established by the State in which they live. AB and APTD provide the same for blind persons and those found to be permanently and totally disabled.

The Medicare program is described in chapter two, but it will be apparent that many of the considerations discussed in this chapter are applicable to Medicare as well.

II. THE RIGHT TO A HEARING

The first question to be considered is the procedural problem relating to hearings and judicial review of decisions made by those administering the programs. With few exceptions, these difficulties could be corrected through the issuance of regulations by HEW without the need for Congressional action. As will be seen in other sections of this chapter, the structure of hearings, and the degree to which specific provisions are present for the procedures to be followed, vary from program to program.

The components of an adquate administrative hearing are usually listed as follows:

—Adequate notice, describing the right to a hearing, rights at that

hearing, the nature of the hearing, and matters to be considered at the hearing;
—Opportunity to appear, be represented by legal counsel of one's choice and to have an impartial decision-maker;
—Opportunity to examine opposing evidence prior to the hearing and adequate time to prepare for the hearing;
—The right to testify and present evidence, and to confront and cross-examine adverse witnesses; and
—A prompt and written decision.

Provision for these elements should reflect a special awareness of the persons who often request hearings in benefit programs. They are unlikely to be highly educated, to be represented by counsel, and to have more than a superficial understanding of the procedures or substance involved in an administrative hearing.

The present situation with regard to hearings in the categorical assistance programs is controlled by a fair hearing regulation which recently became operative.[1] Many of the above listed components are required by the regulation. Lacking is the right to examine adverse evidence prior to the hearing. Judicial review is left to procedures provided by each participating State.

OASDI hearings, which include Medicare hearings, are distinguishable from categorical assistance hearings. The Federal regulations dictating the structure of OASDI hearings contain most of the above listed safeguards, except that prompt decisions are not required.[2] The practice in most areas is to allow claimants access to adverse written evidence prior to the date of the hearing. Judicial review is provided for in United States district courts.[3]

Medicare hearings are the same as OASDI hearings for Part A of Medicare and for questions of entitlement under Part B.[4] Lacking are hearings, except as conducted by a carrier, for questions of amount under Part B, and judicial review of claims of less than $1,000 and of all questions of amount under Part B.[5]

Veterans' benefits are not subject to administrative review hearings and judicial review is expressly excluded by statute.[6]

A. Timing of Hearings

Prior hearings—that is a fair hearing before benefits may be terminated or reduced in amount—are essential for the protection of persons receiving benefits under any of these programs. The Supreme Court of the United States recently recognized the severe injury and hardship suffered by persons whose categorical assistance grants are wrongfully terminated. The recent HEW regulation, mentioned above, extends to all categorical assistance recipients the right to continued benefits until a fair hearing is held, when one is requested because of a termination or reduction of assistance.[7]

[1] 45 C.F.R. § 205.10.
[2] Social Security Act § 205 (b) and § 205 (d); 20 C.F.R. § 404.901 *et seq.*
[3] Social Security Act § 205 (g).
[4] Social Security Act § 1869.
[5] See also Chapter Two for administrative and judicial review under Part A and Part B of Medicare.
[6] 38 U.S.C. § 211; *Milliken v. Gleason*, 332 F. 2d 122 (1st Cir. 1964), cert. denied 379 U.S. 1002 (1965).
[7] 45 C.F.R. § 205.10 (a) (5).

This practice should be made mandatory for OASDI. Beneficiaries of these programs are often as dependent upon such benefits, and suffer as severe deprivation when wrongfully denied them as recipients of categorical assistance. Although we too often think of OASDI as supplemental income for elderly persons, one-fourth of the couples on the OASDI rolls and two-fifths of the nonmarried depended on OASDI for almost their entire support in 1967.[8]

B. Attorney's Fees

Perhaps as important as the procedural protection afforded by a satisfactory hearing and prior hearing is provision for representation by legal counsel of one's choice. Both the categorical assistance programs and OASDI assure claimants the right to be represented at hearings by legal counsel or other representatives.[9]

But authority is lacking in both categorical assistance programs and OASDI for payment by a public agency of the attorneys' fees incurred by the claimants for services provided in conjunction with hearings and subsequent judicial review. This results in substantial numbers of claimants who are unable to retain counsel at hearings and who do not even request hearings because they never receive informed opinions as to the likelihood of success should they request a hearing. Numerous persons are thereby denied their rights to benefits even though a recent study concluded that 64 percent of disability denials were reversed at hearings in 1966–67.[10]

A large number of approaches could be used. The most innocuous and least expensive would simply be to require State welfare offices and local Social Security offices to inform applicants, in writing, along with any denial, termination, or reduction of grants, of the nearest legal aid, legal services or other office from which legal counsel can be obtained without cost. This could now be done by local offices as a matter of policy without any addition to current Federal regulations.

A more beneficial approach would be the provision, either directly, or by payment to legal counsel chosen by claimants, of legal representatives.

The present method of remunerating legal counsel for OASDI hearings and subsequent judicial review illustrates many of the contending factors which arise when attorneys are paid by claimants. Attorneys are now limited to a maximum fee, regardless of the extent of quality of their work, of 25 percent of the total past-due benefits recovered at a hearing or a subsequent court appeal.[11] Obviously in many cases attorneys are not adequately compensated, and more important, are extremely hesitant to represent cliamants in hearings where the amount of past-due benefits is small, where the likelihood of success is questionable, or where the foreseeability of a subsequent court appeal threatens. Another less rarely considered drawback to the present system, is the hardship placed on claimants whose attorneys, even though compensation is set by the Secretary or judge in each case, have the tendency to wait until large sums of past-due benefits have

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[8] Bixby, *Income of People Aged 65 and Older: Overview from 1968 Survey of the Aged*, Social Security Bulletin, Vol. 33, No. 4, April 1970, p. 3.

[9] 45 C.F.R. §205.10(a)(2)(iii). Social Security Act §206(a); 20 C.F.R. §401.971–73.

[10] Viles, *The Social Security Administration Versus the Lawyers . . . And Poor People Too*, 39 Miss. L.J. 370. 395 (1968).

[11] Social Security Act §206.

accumulated, knowing that the Secretary or judge will be more lenient in approving larger attorneys' fees the greater the amount of the recovered benefit. A countervailing aim in limiting attorneys' fees to 25 percent of past-due benefits recovered is to protect OASDI benefits against dilution by the deduction of excessive attorneys' fees. The result of this conflict is that claimants have the most difficulty in obtaining legal representation in those cases where it is most needed—complicated, lengthy and difficult cases.

We would propose that Federal funds be made available to pay attorneys' fees in cases where the Secretary and/or a court sets attorneys' fees at more than 25 percent of the past-due benefits. Also needed are Federal funds to pay attorneys' fees in those cases which involve small amounts in past-due benefits, insufficient to provide adequate compensation for an attorney who is limited to one-fourth their amount.

Little can be gained by forcing a claimant to either proceed to a hearing without legal representation because one-fourth his past-due benefits are insufficient to compensate an attorney, to have to suffer until he has accumulated sufficient past-due benefits to attract an attorney, or to face a hearing alone because his claim is too difficult to justify an attorney's time at the contingent rate of 25 percent of his past-due benefits.

Provision of free legal counsel, to all claimants, at all categorical assistance and OASDI hearings and court appeals, deserves further study, and should be the ultimate goal. The lack of legal representation at many hearings, by itself, speaks loudly for provision of legal counsel to claimants. Certainly this is so where the benefits are the claimants' sole means of support.

C. Evidence at Hearings

Analogous to the problem of free legal representation is the expense incurred in gathering evidence in disability hearings. The opportunity to have an independent medical examination made, and paid for by HEW, at the request of a claimant in a disability hearing, is an indispensable aspect of an adequate hearing. There is little point in providing procedural safeguards at the hearing level if indigent persons are unable, in disability cases, to obtain the very evidence which forms the essence of their case.

Furthermore, in all OASDI and categorical assistance hearings beneficiaries and recipients must be protected against decisions based purely on hearsay evidence submitted by HEW. Hearsay evidence, inadmissable at a court of law, is admissable at such administrative hearings, and its admission can result in the denial of the rights to confront and cross-examine adverse witnesses. A claimant should be afforded the opportunity to question adverse witnesses, especially doctors in disability hearings. At present, HEW fails to produce doctors to substantiate their reports, and hearing examiners refuse to issue subpoenas to compel their attendance at disability hearings. Without some protection against the admission of hearsay, the claimant is faced with a situation in which a decision against him may be rendered without his ever having a chance to question any of those persons responsible for the evidence on which the decision is based.

D. Decisions

There is a stunning lack of uniformity and consistency in the decisions rendered by Social Security Administration officers and hearing examiners in various sections of the country in OASDI cases. The same is true of categorical assistance cases, but these can be partially explained by differences in State laws upon which most of these decisions are founded.

But in OASDI, a national program, uniformity of application of the laws and regulations, and consistent decisions should be an accomplished part of the program. Pressure from above is needed to ensure that local offices uniformly apply the laws and regulations throughout the country. Hearing examiners would benefit from additional publication of hearing decisions from other sections of the country, as would those persons who represent claimants. The quarterly publication of selected, abridged decisions presently available is insufficient to keep examiners and claimants apprised of the decisional trends at the hearing level.

III. WHEN ONE BENEFIT REDUCES ANOTHER

The interrelationship of these programs poses a number of questions of basic fairness which are often overlooked by elderly persons and groups representing them. Most pressing of these is the corresponding reduction in the amounts paid by many private pensions, annuities, OAA, and veterans' pensions as OASDI benefits increase. OASDI benefits were increased 15 per cent retroactive to January 1970, in response to recognition by Congress of the toll that inflation has taken on the real income received by the elderly. Yet, this increase is partially lost to those who are in the most severe need of it—those who are so poor that their income from OASDI is not sufficient to enable them to survive without receiving OAA or veterans' benefits.

Congress partially recognized the problem in requiring States to maintain previous OAA grants so that at least $4 of the monthly increase in OASDI benefits must be received by OAA recipients before OAA grants can be reduced. Veterans' benefits also are decreased in such a way as to allow recipients to retain some of their OASDI increases, resulting in some increase in their total incomes.

The need to recognize the extreme hardship caused by recent inflation to persons on fixed incomes, who are already receiving OAA or Veterans' benefits as additions to their inadequate OASDI benefits, was not satisfactorily remedied by Congress. Steps must be taken to ensure that future OASDI increases are retained by those who are in the most need of them, those who are so poor that they must receive income from other public sources in order to survive.

The same considerations apply to private pensions and annuities. Although the trend is to make the amount received from private sources independent of any future increases in OASDI, the need is still present to press for elimination of such dependency in all private pensions and annuities. Employers, unions, employees, insurance companies, and other sources of retirement income, should be capable of more accurately foreseeing the future, so that realistic programs, which are independent of changes in OASDI levels, can be formulated.

A. Offsets Against Disability Payments

The Social Security Act provides for an offset of workmen's compensation benefits against disability benefits, resulting in the receipt of less than the total of disability and workmen's compensation payments an individual would normally be entitled to.[12] This offset is mandatory regardless of the basis for an award of workmen's compensation, even if the basis of the award is independent of the reason the recipient is considered disabled. The only requirement for offset is receipt of both payments in the same month. The difficulties often presented by this system are obvious. An individual, previously earning a wage sufficient to support himself and his family, can suffer two separate catastrophes entitling him to both workmen's compensation and disability. Yet because of the offset he is precluded from receiving benefits approaching his previous wage level. He suffers, as well as his family, often for circumstances beyond his control. Some recognition is needed so that sources of income from other Federal—or State—established programs received by disability and other OASDI beneficiaries are not automatically suspect and "taken" from individual recipients. Each program was created for specific purposes and with specific goals, and an individual who qualifies for more than one should not be penalized by another. Disability benefits are not offset against income received from private sources. A disabled worker, with millions of dollars invested in the stock market, would not have his quarterly dividends offset against his disability payments. Those who qualify for payments from both workmen's compensation and disability should have the same privilege.[13]

Efforts should also be made to examine the possible ill effects of OASDI maximum family benefits. There seems to be no justification for penalizing large families, whose needs per person do not diminish with the number of family members.

IV. EFFECT OF INADEQUATE BENEFIT LEVELS

An understanding of the plight of many elderly persons, even after the recent increases in OASDI, can be gained from a consideration of the inadequacy of OASDI benefits. When we focus on the plight of elderly persons we are dealing with a significant number of persons; for, as pointed out earlier:

—One-fourth of the couples on the OASDI rolls and two-fifths of the nonmarried were dependent on OASDHI for almost their entire support in 1967.
—Half of the widows receiving OASDHI had total incomes below $1,300 and only one in sixteen had as much as $4,000.
—Ten percent received some cash support from local welfare agencies.
—More than one-fifth of all OASDHI couples had incomes less than $2,000 in 1967.[14]

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[12] Social Security Act §224 (a).
[13] Under present law the combined Social Security and workmen's compensation payments for a disabled worker and his family cannot exceed 80 percent of the worker's average earnings before he became disabled. H.R. 17550 (the House-passed Social Security Amendments) would permit combined benefits equaling 100 percent of the worker's average earnings.
[14] Bixby, *supra*, n 8, at p. 3.

—The average Social Security benefit of a couple retiring in 1950 met half the Bureau of Labor Statistics budget cost, but in 1967 it met less than one-third.[15]

—In 1966 there were 2.1 million aged women living alone with income less than the Social Security Administration's poverty index.[16]

—Half the older people living alone or with nonrelatives in 1967 had incomes no larger than $1,480, and one in four had income of $1,000 or less.[17]

This is in spite of special circumstances which often necessitate proportionately greater income for the elderly as opposed to younger, larger family units. The elderly often have the same housing and utility needs as larger families. Supply will many times force a single adult to live in an apartment large enough for a small family, yet he pays the same rent as the family, while he receives less aid than a small family. Although his food costs are lower than a small family's, elderly persons more often must pay to have food delivered, or are only physically capable of shopping in small nearby stores where prices are higher than larger stores more easily reached by the young.

And, of course, the medical and drug expenses of the elderly exceed those of the young. Categorical assistance programs, and OASDI too often fail to envision the needs of the elderly poor in terms of family units, often composed of a single person. Recognition of their needs in terms of family units would lead to a more realistic setting of benefit levels.

The inadequacy of categorical assistance benefits has been pointed out too often for further discussion here. In addition to raising the general level of benefits, special attention should be placed on providing funeral benefits, homemaker services, nursing services, grants for recreation, and transportation—recognizing the particular needs of elderly persons.

V. WAGE BASE AND RETIREMENT TEST

A number of more specific changes in the structure of OASDI deserve mentioning at this juncture. The payroll tax, with its present restrictions of the taxable wage base at $7,800, forms an extremely regressive method of financing. Part of the program should be financed by general revenues and a more equitable tax structure. The working class person, just able to support his family on a salary of approximately $7,800 pays tax on every dollar he earns, while persons earning in excess of $7,800, regardless of their income, pay OASDI taxes only on $7,800, a lower proportionate tax on their total income than the poorest wage earner. OASDI should be viewed as the primary source of income for most of the elderly, and as a method for providing a decent standard of living for those who have contributed to our society for many years as workers. As such some redistribution of income, from the more fortunate to the less, as well as the obvious transfer of income from working generations to retired generations, should be accepted as part of our commitment to provide for the elderly poor. To the extent

[15] Special Committee on Aging, United States Senate, *Economics of Aging: Toward a Full Share in Abundance*, Ninety-First Congress, U.S. Government Printing Office, 1969, pt. 1, p. 155.
[16] *Ibid.*, p. 163.
[17] *Ibid.*, p. 187.

that the wage base is increased and the present gradations between benefit levels maintained, the regressive nature of the present payroll taxing scheme is reduced. It is noteworthy that the OASDI amendments recently passed by the House of Representatives would increase the taxable wage base from $7,800 to $9,000.

Another amendment would increase the retirement test from $1,680 to $2,000. This is the amount of earned income a person may have annually without having a decrease in his retirement benefits.

Ideally the retirement test should be eliminated. But liberalization of the retirement test is desirable as it encourages elderly persons to continue working without the loss of benefits. The result would be an increase in the total income of those elderly persons whose earned income exceeds the retirement test, permitting them greater self-sufficiency. The dignity provided elderly persons in being able to retain jobs without being penalized for earning more than an artificially low retirement income, as well as the values to our economy in the retention of many of its most skilled and knowledgeable employees, who now succumb to the pressure to limit their earnings, would be immeasureable.

It can be argued that the test should be retained at a more reasonable level, not eliminated, for elimination would (1) Defeat the aim of OASDI to protect against loss of earnings, as opposed to merely paying an annuity to persons who reach a certain age, (2) Benefit those who need it the least, those capable and healthy enough to earn substantial amounts after the normal retirement age of most.

Other possible innovations might entail some inclusion in the retirement test of income sources other than earned income. Inclusion of only earned income for purposes of the retirement test tends to penalize some of the poorest of the elderly, those who lack income from other sources and must continue working after the normal retirement age. Increasing the retirement test, while including other income sources, would more evenly spread the burden of the test among those who not only work but also those who have income from other sources as well. A sliding scale could be adopted so that those who worked and received unearned income from other sources would be placed on an equal footing with those who had only earned income. After all, retirement benefits seek to provide income to the elderly, not to more favorably reward those who have accumulated enough to provide themselves with enough unearned income after retirement so that they do not have to work.

Consideration should also be given to having the retirement test increase at least at the rate that the cost of living rises.

Only a brief comment need be made concerning the preferences given women in computing average earnings for purposes of determining the primary insurance amount in OASDI. Fewer earnings years are considered for women. This has the effect of increasing their average earnings over those of a man who has the same earnings record. The approach seems aimed at compensating women for the various forms of employment discrimination which in turn are reflected in their having earned less than their male counterparts. As women

acquire a more equal place in our labor market these preferences should be re-examined.[18]

VI RETROACTIVE BENEFITS

OASDI now provides a one-year limitation on the amount of retroactive benefits, measured from the date of application.[19] It is suggested that this one year period be lengthened. The usual reasons given for limiting retroactive claims—such as the difficulty of obtaining evidence, harassment by one party of another over a stale claim, and the desire for a final decision after a number of years—do not exist in most OASDI cases. The claimant has the burden of establishing entitlement in all cases, so little harm is encountered by allowing him to attempt to establish his entitlement after the one-year period. Delay and harassment are less important factors since HEW is always the other party.

The one-year limitation harms those who deserve the least to suffer—the poor, less informed worker with limited education, who does not know of his legal right to OASDI, and who is less likely to come into contact with persons who will inform him of his rights. At least retirement benefits should be paid retroactively to the date of first entitlement. Careful examination of methods of record keeping by the Social Security Administration, with the advent of computer technology, should enable the keeping of records which would allow payment of full retroactive benefits.

Related to the ability of the Social Security Administration to keep adequate records of persons entitled to retirement benefits is the requirement that an application be filed by the potential recipient before benefits are granted.[20] The Social Security Administration should aim to maintain a procedure which would enable it to notify persons of their eligibility when they reach the age of 62, and again at age 65 if they decline to begin receiving benefits at age 62. Obviously there are tremendous difficulties in tracing persons, but since payments coming into the fund are continually credited to individuals' accounts, records, at least of places of employment, could be used to notify working persons of their entitlement at age 62.

Related to the question of a hearing prior to the termination or reduction of categorical assistance or OASDI benefits, is the need for interim payments from the date of initial application for categorical assistance or OASDI to the eventual approval of the application. This is crucial in circumstances where the individual is in extreme need and has no other resources. It is especially equitable in those cases where it is reasonably certain that the applicant's claim will be approved, and the time lapse between application and approval is necessitated by the practical difficulties of obtaining evidence of the applicant's age, quarters of covered employment, and benefit amounts.

Most States already provide emergency assistance from the date of application to the time eligibility is determined, for categorical aid applicants in dire need; but similar temporary assistance is not part of

[18] H.R. 17550, passed by the House of Representatives on May 21, 1970, provides an age-62 computation point for men (the same as for women), instead of the present 65 year requirement.
[19] Social Security Act § 202 (j) (1).
[20] Social Security Act §202 (a) (3).

OASDI or veterans' benefits. At the very least, OASDI should provide temporary assistance to those applicants suffering extreme hardship when the reason for delay in the processing of the application is a matter within the exclusive control—such as checking whether an individual has sufficient quarters of coverage to be fully insured—of the Social Security Administration.

VII DEFINITION OF "DISABILITY"

"Disability" for purposes of OASDI is defined as an "inability to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." [21] The Social Security Administration chooses to define the law strictly and persuaded Congress to adopt restrictive amendments in 1967 and 1968 to modify the impact of relatively liberal court decisions.[22] The most obnoxious of these amendments demands that a disabled beneficiary be *unable* to do not only his previous work but also "any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." [23] It is inconceivable to demand that a man, especially a disabled man, move himself and his family away from familiar surroundings and long-time friends, to take a far away menial job, for which he is barely qualified by reason of his disability. Some Courts have recognized this.[24] The statute should be amended to reflect this reality.

> Although it is true that some disability beneficiaries could or should be rehabilitated by agencies established for that purpose, the facilities and capabilities of the agencies are often inadequate for the task. While some disability claimants could obtain light but remunerative work if they resided elsewhere in the nation, they do not reside elsewhere. It is unreasonable to expect that they will move elsewhere, and there are few facilities for expediting their relocation. Although some disability beneficiaries could do some work if they would overcome the neuroses or their lack of motivation, in fact the problems of their minds and emotions are not of their deliberate manufacture, control, or removal; and while some disability claimants should look to unemployment compensation for assistance, it is also true that unemployment compensation is seldom available to the long-term unemployed who are the least desirable employees. This list of factors and its endless continuation deserves the con-

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[21] Social Security Act § 223 (d)(1)(A).

[22] Viles, *supra*, n. 10, at p. 371.

[23] Social Security Act § 223(d)(2)(A). The job can be anywhere in the country so long as it exists in "significant numbers either in the region where such individual lives or in several regions of the country."

[24] See *e.g.*, *Wimmer* v. *Celebrezze*, 355 F.2d 289 (4th Cir. 1966) and cases cited (the employment must be within a reasonably accessible labor market). See for many cases, Annotation, "Necessity and Sufficiency of Showing that Substantial Gainful Activity Is Available to Disability Claimants Under Federal Social Security Act" 22 A.L.R. 3rd 440 (1968) (does not take account of the 1969 amendments), *Reyes Robes* v. *Gardner*, 287 F. Supp. 220 (D. Puerto Rico 1968) (detailed investigation rev'd sub. nom. 409 F.2d 84 1st Cir. 1969).

sideration of any Congress undertaking to redefine the meaning of disability.[25]

These are the kind of "common sense" concerns which should lie behind such "remedial social legislation" as the disability benefit laws. Congress must be persuaded that this is a charitable and rich country which can afford to share its wealth with the unfortunate victims of our highly technical industrial complex and therefore can and must be liberal with disability (as well as welfare) benefits.

VIII. A "VESTED RIGHT?"

In *Flemming* v. *Nestor*,[26] the Supreme Court held that Social Security benefits "cannot properly be considered to reach the order of an accrued property right." Further, in holding that the loss of benefits was not a punishment and hence not a bill of attainder, the Court held that "[h]ere the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed. . . ." Nestor had been a member of the Communist Party from 1933 to 1939.

In response to this decision a prominent law professor wrote:

> When all is said and done about stripping the social insurances of their supposed insurance attributes, this much remains, however, to be said: the beneficiary does make a financial contribution, whether correctly called a premium or a tax, which is regularly and observably deducted from his wages. From this he gains a feeling of personal involvement, the belief that his contribution is directly traceable to the benefit and a strong sense that he has a right to it. Whatever may be the strictly logical and legal significance of the contribution, it is a political, social, and psychological fact of the utmost importance, both in terms of the continually increasing benefits and the willingness to pay for them, and in terms of popular mass demand that the worst features of public assistance be avoided.[27]

The frustration of expectations was certainly a major element in the injustice of the *Nestor* decision—how many people (including Nestor) change their patterns of saving and insurance in reliance upon anticipated Social Security? [28] Yet the result of *Nestor* and the cases following it [29] is that Congress may at any time change the program to the detriment of expectant beneficiaries. Social Security is too important to people who have relied upon it to be subject to arbitrary Congressional defeasance. Program flexibility surely does not justify the drastic injustice which befell Nestor. The Act could be amended so that "rights vest" at age 45 or 50 (of course benefits may be thereafter increased, just not reduced). This would work a compromise between the need for flexibility and the necessity not to

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[25] Viles, supra note 10 at page 403-404. A number of bills have been introduced to change the requirements for disability benefits. For example, S.3100—introduced by Senator Harrison Williams—would provide coverage if a worker would be unable to engage in any substantial activity (by reason of a medically determinable physical or mental impairment) in his regular work or in any other work in which he had engaged with any regularity in the recent past.

[26] 363 U.S. 603 (1960).

[27] Ten Broek, "The Disabled and Welfare," 54 Calif. L. Rev. 809, 821 (1966).

[28] See O'Neil, "Unconstitutional Conditions: Welfare Benefits with Strings Attached", 54 Calif. L. Rev. 443, 470 (1966).

[29] *e.g. Stoupe v. Jones*, 284 F.2d 240 (D.C. Cir. 1960) (disability annuity pursuant to §6 of the 1930 Civil Service Retirement Act was cut off by a 1956 amendment).

frustrate the just expectations of the workers involved. If cut off or otherwise detrimentally affected at or before 45 or 50, workers would still have time to purchase their own retirement insurance.

The Court in *Nestor* did note that the "interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Kelly* v. *Goldberg*[30] exemplifies the importance of this recognition of extent of interest. There, categorical assistance, rather than OASDI, was involved. The court held that due process requires a hearing *before* termination of welfare benefits. "The extend to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'. . . ." Quoting Professor Reich, who emphasizes that "such sources of security . . . (social security and welfare among them) are no longer regarded as luxuries or gratuities; to the recipients they are essentials," the Court states that "it may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' " As mentioned earlier, in the area of veterans' benefits due process has been dominated by the gratuity facade, and judicial review of administrators' decisions is precluded.[31]

The new Family Assistance Plan proposes to preclude review of factual determinations. And Senator Ribicoff's amendments to that Act, which propose the federalization of the adult assistance programs, Aid to the Aged, Blind, and Disabled, include a section denying court review of factual determinations.

Judicial review corrects arbitrary decisions. The prospect of it keeps administrators in line.[32] When important interests are at stake, there should and must be a right to resort to the courts.

We conclude that the notion of privilege in the context of social welfare benefits, upon which people rely so heavily, is a perversion of thought and of language. If the courts persist in making use, to whatever extent, of this out-dated concept, it is essential that the legislature preclude such arbitrary defeasance of vested rights.

IX. RELATIVES' RESPONSIBILITY

The proposed welfare reform legislation, the Family Assistance Plan, provides that in determining need for aid to the aged, blind and disabled, "the state agency may not consider the financial responsibility of any individual for any applicant or recepient unless the applicant or recipient is the individual's spouse or the individual's child who is under the age of twenty-one or is blind or severely disabled." Today relative responsibility provisions are widespread.[33]

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[30] 397 U.S. 254 (1970).

[31] See Reich. "The New Property", 73 Yale L. J. 733 (1964); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues", 74 Yale L. J. 1245 (1965).

[32] See Berger, "Administrative Arbitrariness and Judicial Review", 65 Colum. L. Rev. 55 (1965).

[33] They are so common and lengthy that the Department of Health, Education, and Welfare survey omits them. "Because of complexity and length, provisions relating to the responsibility of relatives to support are not included." U.S. Dept. of Health, Educ. & Welfare, Soc. Sec. Admins., Bur. of Fam. Serv., Pub. Assis. Rep. No. 50, Characteristics of State Public Assistance Plans Under the Social Security Act 6 (1967). Statutes in all fifty states and the District of Columbia render one or more private individuals responsible for cost of support and care of inmates of state hospitals. Comment. 39 N.Y.U. L. Rev. 858 (1964). Other welfare statutes commonly require contribution from relatives. See, *e.g.*, New Jersey Rev. Stat. 44: 1-140 (Cum Supp. 1969): "The father, grandfather, mother, grandmother, children, and husband or wife, severally and respectively, of a poor, old, blind, lame, or impotent person or other poor person or child not able to work, shall, if of sufficient ability, at his or their charge and expense, relieve and maintain the poor person or child . . . ." See Mandelker, "Family Responsibility Under the American Poor Laws", 54 Michigan L. Rev. 497, 607 (1956).

Federal law should be amended to completely eliminate such provisions. The model should be *Department of Mental Hygiene* v. *Kirchner*,[34] where the California Supreme Court held that a statute requiring an adult child to pay the State mental hospital expenses of her mother was a denial of the equal protection of the laws.

The practical reasons justifying the elimination of the laws have been pointed out:

> The motive was that long maintained by a large body of social work opinion that liability of relatives creates and increases family dissension and controversy, weakens and destroys family ties at the very time and in the very circumstances where they are most needed, imposes an undue burden upon the poor (for such the relatives almost always are) and is therefore socially undesirable, financially unproductive, and administratively unfeasible.[35]

On a more philosophical level:

> The economics of distress are intricately bound up with social and psychological factors in the environment. Accordingly, the principal cause of dependency is not individual, but social, a need for protection arising from the complexities of modern society and the imperfections of a rapidly advancing economy. Since a major cause of poverty is social, over which the individual has no control, relief is a proper charge against the total economy.
>
> Welfare, like education, or the provision of police and fire protection, is a basic public function benefiting all who live in the community. Questions as to who derives special benefits—the mentally gifted from education, the person who is protected against criminal assault by the police, the person whose home is saved from the flames by firemen, the recipient of welfare grants and services, let alone his relatives—are irrelevant.[36]

In this light, even the reform provision of the Family Assistance Plan must be found wanting.

X. INCOME ELIGIBILITY FOR CATEGORICAL ASSISTANCE

A particularly onerous burden placed on the elderly by the categorical assistance programs deserves mentioning. Eligibility requirements for these programs necessarily include limitations on the amount of income that applicants may have in order to receive assistance. Although recipients may retain some reserves, income limitations are placed at irrationally low levels and are applied to forms of income which are especially sacred to the elderly.

Elderly persons, who have worked throughout their lives, but find Social Security retirement benefits inadequate to support them, are ineligible for categorical assistance unless they agree to place a lien,

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[34] 60 Cal 2d 716, 36 Cal Rptr 488, 388 P2d 720 (1964); vacated and remanded, 380 US 194 (1965); clarified per curium 62 Cal 2d 586, 43 Cal Rptr 329, 400 P2d 321 (1965).

[35] Ten Broek, "California's Dual System of Family Law: Its Origin, Development, and Present Status," 17 Stan. L. Rev. 614, 645–646 (1965).

[36] *Id.* at 642.

for the value of assistance received, on the modest home which they had struggled to meet payments on for years. They are also forced to assign life insurance policies, no matter how small in amount, to State welfare departments as a condition of receiving aid. Burial insurance or prepaid funeral and burial contracts must also be assigned. There are of course other income restrictions, such as on the value of automobiles and the amount of personal savings that applicants may have.

The most strongly felt objection is to the nature of such income limitations and the tragic choice they place in the lap of many elderly persons. A person after having spent the bulk of his lifetime paying for a modest home, for a minimal life insurance policy, the proceeds of which are meant for his surviving spouse or children, and for his funeral and burial, is forced to relinquish these things in return for enough assistance to survive the few years he has left. A system which poses such harsh choices on our elderly, failing to recognize the non-economic value and attachment elderly persons have for certain of their resources, needs some alteration to make it more sensitive to the human factors that make a burial contract valued at $300 very different from $300 in a bank account.

Recovery of categorical assistance payments from individuals should be eliminated. Although the *Kirchner* rationale would seem to extend to individual responsibility, the California court indicated that such responsibility provisions were acceptable. In *Snell* v. *Wyman*,[37] New York State's provision for recovery from the estate of a deceased person who had received welfare [38] was upheld against constitutional attack. The decision treated welfare law as just one more aspect of the law of economic regulation of business. However, as should be obvious to anyone, welfare law is vitally different. The dramatic difference is that welfare law deals with the basic needs of impoverished human beings, a difference which justifies not imposing individual liability on welfare recipients for repayment of benefits received.

A social benefit is derived from welfare and a State's attempt to finance it by recovery from recipients defeats the very purpose and goals of welfare legislation. At the point where a recipient is economically self-sufficient, welfare legislation has accomplished its goal and recovery can only discourage the recipient from attaining self-sufficiency.

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[37] *Snell v. Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), aff'd, 393 U.S. 323 (1969).
[38] N.Y. Soc. Welfare Law §§ 104 thru 104-a (McKinney 1966).

CHAPTER TWO

THE "RIGHT" TO HIGH QUALITY HEALTH CARE

(By James A. Kraus and Mark A. Wurm*)

I. MEDICARE

In 1965—after a struggle spanning three decades—the historic Medicare law was signed into law.

For millions of older Americans, Medicare brought peace of mind. But, for other aged persons, Medicare lead to administrative and legal controversies which remain unresolved today.

A. Coverage Under Medicare

Part A hospital insurance benefits are available to persons eligible for Social Security, or Railroad Retirement benefits. Inpatient hospital services are covered for up to 90 days in any spell of illness. There is also an additional lifetime reserve of 60 days. There is a $52 deductible for each spell of illness plus co-insurance of $13 for each day after the 60th and through the 90th day. Psychiatric hospital services are limited to 190 days during a person's lifetime.

Post-hospital extended care (i.e., skilled nursing services) is covered for up to 100 days in any spell of illness. The patient must have been hospitalized for at least 3 days and transferred within 14 days to the extended care facility. There is co-insurance of ⅛ of the hospital deductible for each day after the 20th and through the 100th day.

Post-hospital home health services are covered for up to 100 visits within one year after the beginning of a spell of illness and before the beginning of another spell of illness. There is no deductible or co-insurance requirement. These services are nursing care, physical or occupational therapy, medical social services, and medical supplies other than drugs.

Part B supplementary medical insurance is available to anyone 65 or over who elects to enroll and pay monthly premiums. There is an annual deductible and 20 percent co-insurance.

Physicians' services are covered. This includes surgery and home, office, and institutional calls.

Other health services are also covered, including administered drugs and outpatient hospital diagnostic services incident to physician

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The view of the authors do not necessarily reflect the policy of the Center on Social Welfare Policy and Law, Columbia University.

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services. Diagnostic X-rays and laboratory tests are covered. Isotope and X-ray therapy, rentable medical equipment, prosthetic devices and ambulance services are covered.

Outpatient physical therapy services are covered. Home health services for up to 100 visits in a calendar year are covered without the need for prior hospitalization.

B. Retroactive Denial of Benefits

Problem.—A patient on the advice and order of a doctor is placed in an extended care facility (ECF). Subsequently, the Social Security Administration or its agent, the fiscal intermediary, determines that the services rendered were not medically necessary, were custodial and thus not covered. Reimbursement is denied and the patient is liable to the ECF, (or other provider of services) for services rendered.

It is obvious that a patient acts innocently and cannot but rely on what medical experts (doctor and ECF) tell him. The patient ought to be protected.

1. **The doctor is required to certify the medical necessity of services provided. This should be conclusive as against the patient, exempting him from liability.**

It is not an undue burden for the ECF because there is an instructional manual and SS letters to guide it.

2. **There are always marginal cases. To prevent the ECF from risk in these cases there should be automatic eligibility for a short period (e.g., one week, upon transfer from a hospital to an ECF). This has been recommended.[1] There presently exists a method for speedy determination in questionable cases.[2]**
3. **Retroactive denial often results from lax administrative practice. The ECF should be required to get an initial determination of eligibility. If the intermediary delays, neither the patient nor the ECF should be penalized by a denial of benefits.**

Intermediary performance is poor. Average processing time for bills is 12.1 days. Even more significant, an average of 12.9 percent of all bills are kept pending by intermediaries for 30 days or more. Five intermediaries had 50 percent or more of their bills outstanding and the high was an intermediary with 92.3 percent of its bills outstanding for 30 days or more. The cost of this outrage is presently assessed against patients. [3]

C. Unresolved Litigational Problems of Retroactive Denial of Benefits

Given a denial of benefits, a provider sends a bill for services to the patient. A patient, upon denial, may contest the determination. He files for reconsideration before SSA, and if denied, he may request a hearing.

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[1] Medicare and Medicaid Staff Report, Senate Finance Committee, p. 111 (February, 1970). In addition, H.R. 17550 would authorize the Secretary of HEW to establish specific periods of time during which a patient would be presumed to require services in a nursing home.

[2] Intermediary Letter No. 328, Bureau of Health Insurance, SSA (June, 1968). This procedure appears to be haphazardly invoked.

[3] Medicare and Medicaid, pp. 115–116.

It is unclear whether a provider may sue a patient on a bill before a final administrative determination or whether his contract with SSA prevents this.

Generally a Social Security recipient will not have the liquid assets to pay a major medical expense, He then suffers the very thing Medicare is designed to prevent: financial catastrophe. He must either use all his savings or sell his home, etc. If afterwards SSA makes payment, it will not make him whole again. Therefore, providers should not be allowed to collect against a patient until a final determination by SSA.

D. Administrative and Judicial Review of Part A and B Determinations

A patient has a right to administrative review of an intermediary's decision under Part A (Hospital Insurance) only if the amount in controversy is $100 or more, Judicial review may be had only if the amount is $1,000 or more.[4]

A patient should be able to obtain administrative and judicial review regardless of the amount in controversy. Social Security determinations are reviewable without regard to amount. There already exists staff for Social Security and disability hearings with sufficient expertise, including medical, to handle Medicare determinations. Medical costs are such an important aspect of the elderly's concern that they should be provided this protection.

There is no administrative or judicial review of amount of benefit determinations under Part B (Supplementary Medical Insurance). Rather there is a "fair hearing" procedure undertaken by the carrier (which made the original determination).[5]

Delegating final decision-making power to a private body, the carrier, in the operation of a governmental program is both novel and potentially dangerous. No other government benefit program is run this way. It runs contrary to a basic tenet of American government: public accountability.

It may have been thought that carriers had sufficient expertise to adequately administer the program. Yet SSA has never made a determination of the efficiency of carriers and has automatically renewed their contracts. The carriers refuse to give SSA requested, pertinent data.[6] Their performance in processing bills, errors made and complaints handled is discouraging.[7]

The fair hearing procedure is not adequate. Because the carrier is a private body, there is no compulsory process and no testimony under oath.

E. Desirable Changes in Coverage of Medicare

1. DRUGS

The largest health expenditure of the aged (left uncovered by Medicare) that they must presently pay for is drugs.[8] Medicare at

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[4] 42 U.S.C. § 1395ff.
[5] 20 C.F.R. § 405.801 *et seq.*
[6] Medicare and Medicaid, pp. 117–120.
[7] See Appendix, from Medicare and Medicaid, Appendix H, p. 281 ff.
[8] Robert B. Ball, Commissioner of Social Security, Hearings, Senate Special Committee on Aging, 91st Cong., 1st Sess., p. 24 (April 29–30, 1969).

present only covers drugs used within the hospital or given by a doctor in his office which cannot be self-administered. Coverage ought to be expanded to all prescribed drugs.

2. INTERMEDIATE CARE FACILITIES

Medicaid was amended to provide for intermediate care facilities for persons who needed physical help and assistance beyond what is available in old age homes or from homemaker agencies, but less than skilled nursing services. It was estimated that some 50 percent of persons on OAA, AB, APTD who were in nursing homes only need the level of care in intermediate care facilities.[9]

It should be obvious that this type of care is needed by persons eligible for Medicare, but it is unavailable to them. It is arguable that doctors, acting in their patients' interests, will order skilled nursing services rather than no services at all. To avoid this result and satisfy a real need, Medicare should be expanded to cover this service.

3. SKILLED NURSING SERVICES

There is a limitation on the number of days of skilled nursing service available under Medicare and one consequence is that the aged in the most need of the service do not receive it or only inadequately. Extended care facilities would prefer to admit those they are confident may be released within the coverage period, and these persons are preferentially admitted.

While this is difficult to ascertain it is thought by some that the severely ill or those who will not be well enough to be released are dumped on public chronic care institutions. Another indication is the denial of coverage by SSA of numbers of aged admitted to extended care facilities. Given effective utilization review of patient needs and the alternative of an intermediate care facility there should be no arbitrary limitation on number of days of skilled nursing service.

4. HOMEMAKER SERVICES

Many patients need assistance during a recuperative period not at the level of skilled nursing services but of homemaker services at home. If this benefit were available it might be used as an alternative to institutional care in an ECF. This has been recommended.[10]

II. MEDICAID

Medicaid—enacted in 1965—is designed to provide medical assistance for low-income people of all ages.

Recently the program has come under increasing fire because of rising costs, complaints about "cheating", and bureaucratic red tape. In addition, a number of legal problems have arisen, causing difficulty for the poor and especially the elderly poor.

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[9] Medicare and Medicaid, Staff Report, Senate Finance Committee, pp. 97–98 (February, 1970).

[10] Medicare and Medicaid, p. 111. In addition, H.R. 13139 and S. 3333 would entitle Medicare coverage for services performed by "home maintenance workers" or "household aides."

A. Changes in Mandatory Coverage

At the present time a State's Medicaid program must include only (1) all persons receiving categorical assistance, (2) all persons otherwise eligible for categorical assistance except those who do not meet certain State requirements prohibited by Federal law in Medicaid. A State may include the "medically needy" corresponding to categorical assistance, categories whose income is sufficient for daily living, but not for medical care.

This category should be made mandatory for persons 65 and over. This would "blanket-in" nearly all aged with medical protection, the need for which is not contested.

B. Place Medicaid on an Administrative Parity With Medicare

Medicare and Medicaid for the aged are designed to achieve the same ends: competent medical services for the group and prevention of economic catastrope from illness. The differences primarily derive from financing the systems. The guiding principle for changes in Medicaid should be similarity with Medicare.

The recommendations in the staff report of the Senate Finance Committee should not be effected.[11] Rigid fee schedules should not be used. The same factors must be determined for medical services under Medicaid as under Medicare. Thus the manner of repayment must be the same. Fee schedules for only one of the programs have the practical effect of limiting availability of medical providers.

There should never be a requirement of prior approval of the use of medical services. It has the practical effect of deterring necessary services. Medical providers and physicians are recognized as the necessary parties to determine medical needs of their patients in Medicare and the same responsibility must be afforded medical providers under Medicaid. While prior approval may be thought necessary to curb overutilization, there is no data on whether there is in fact overutilization, only that medical programs are more costly than estimated. Most of this is because of increases in cost of services, not overutilization and prior approval as a way to curb costs only penalizes patients without doing anything to correct the problem of increasing costs.

A patient should not be required to designate a primary physician. There is no demonstrable problem of doctor shopping. In fact, the problem is that most medical providers refuse to serve Medicaid patients. Further, it is a declared object of this legislation to permit patients choice in their medical providers and this requirement would as a practical matter vitiate choice of providers.

III. INVOLUNTARY COMMITMENT OF THE AGED

State mental hospitals are used to warehouse vast numbers of aged senile persons until they die. Most of these persons are not mentally ill. Rather they are physically infirm or senile, suffering from confusion and temporary memory loss. Placement in mental hospitals with little

[11] *Id.* at 127-29.

or no activity or stimulation leads only to further deterioration. But appropriate facilities do not exist, and it is cheaper in money terms to use mental hospitals.

In the District of Columbia, Judge Bazelon has forged a line of legal reasoning that provides the legal underpinning to eliminate this inhumane condition. When the State intercedes in a person's life to place him in a therapeutic environment for his own self interest, the *quid pro quo* is the State's obligation to provide treatment. In order that this be more than a hollow sham the treatment must be based on individual needs and adequate in light of those needs.

Unfortunately, actual experience does not live up to legal theory. No institution has been ordered to upgrade its services. No adequate alternate facilities exist.

Involuntary commitment procedures in various States must be changed. Some States still permit *ex parte* commitment. Notice to the alleged mentally ill person is often dispensed with. Counsel is not generally provided. Hearings may be discretionary or summary. Jury trial is rare. After commitment few States provide for periodic review of continued illness. Commitment is often determinative of incompetence and committees to handle property are appointed.

A full panoply of procedural safeguards must be used to prevent arbitrary and unnecessary commitment. This requires mandatory notice, availability of counsel and a full evidentiary hearing. There must be periodic review. Substantively, the law must be changed to prevent classification of senility (or its euphemistic medical equivalents) as mental illness for purposes of commitment to mental hospitals. Geriatric equivalents of half-way houses should be established.

There is no dispute that many committed elderly need help. They need physical assistance with daily living needs which can only be provided institutionally. They need organized activity. But it has been demonstrated beyond cavil that mental hospitals do not and cannot provide this treatment.

CHAPTER THREE

THE STRUGGLE FOR ADEQUATE SHELTER

(By Stanton J. Price*)

Adequate housing is a major need of all the poor, but the elderly have special requirements and suffer special disabilities.

Certain trends today reflect the housing dilemma of the aged:

—There is a chronic housing shortage in the United States, especially for the poor.

—This lack of housing causes an increase in rents, although the houses and apartment buildings deteriorate.

—National prosperity and a growing population, coupled with the existence of blighted cities, have fostered urban renewal and redevelopment. The result is forced relocation of the poor homeowner and tenant with increased property taxes for adjoining landowners.

—The effect of the above falls most heavily on the elderly poor who have no earning power (or prospects), inadequate government benefits and the burden of skyrocketing costs of illness and infirmity.

—Many elderly wish to be physically integrated into society, not isolated, although advanced age, decreased vigor and receding mobility require accommodation to the housing market.

The Western Center on Law and Poverty in Los Angeles has undertaken on behalf of Legal Research and Services for the Elderly to develop plans to assist the millions of elderly poor confronting serious housing conditions in towns and cities throughout the nation. Located in Santa Monica, the project is called Housing Opportunities for the West Side Elderly (HOWSE).

HOWSE has attempted to explore in depth the impact on the elderly poor of economic, demographic and physical changes in residential neighborhoods. In Santa Monica, Venice and Culver City, where many elderly reside, local governments and real estate interests are intent on attracting a more stable and economically prosperous middle class. These cities are thriving with plans for improvement. Old housing is being demolished and replaced with modern high-rise apartments. The result is that many present long-term homeowners have found themselves financially paralyzed by rising taxes or evicted from their allegedly sub-standard housing because they cannot afford increased rents or because the property has been sold for redevelopment. Their rights and interests are ignored.

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A 1967 report of the Venice Non-Profit Community Development Corporation, for example, states that the future interests of low-income residents are much in doubt. The renewal of Venice, the report continues, calls for an intensive up-grading of the area through the rebuilding of existing structures or their replacement. The elderly have yet to be meaningfully involved in the current rebuilding of Venice. The VNPCDC report finds that little preparation has been made for the inclusion of the elderly in either present or future development plans. Special interest groups, speculators, and even well-meaning public development agencies often force the elderly poor from their life-long homes.

The elderly are generally retired with low fixed incomes. Evidence points to a slow but steady erosion of the holdings of the retired senior citizen with limited or fixed incomes. Through rent increases in new or renovated structures, through the removal of older buildings under code enforcement practices, and a general lack of concern for the consequences of such actions upon residents, increased assessments for community "improvements" often make it impossible for the elderly to maintain a bare subsistence-level standard of living. They cannot always afford the costs of up-grading their homes to present-day standards, nor can they meet higher rents necessitated by improvement costs of their landlords. Thus whether they own or rent, this rise in the cost of living generally requires relocation in less expensive and often more blighted areas.

Because of this activity in Venice, many of the elderly who formerly resided there have begun to relocate in adjacent low income areas of Santa Monica, Culver City and West Los Angeles. These areas typify the housing crisis of the low-income elderly in the United States.

In Venice, along the ocean, much of the housing was built 50 and 60 years ago for summer use and thus not with an eye to permanence. The Building and Safety Department of the City of Los Angeles estimated last year that one-fourth of the housing in Venice is blighted.

In any event, 44.6 percent of the housing was built before 1939 and another 20 percent between 1939 and 1949. This, for Southern California, is old. Between 1961 and 1967 the City Building Inspectors swept through the canal and beach areas. Out of 1,600 structures, 488 were condemned. Most of these structures were torn down and almost none of them have been replaced, giving the area a ravaged Rotterdam 1940 look. Much of what remains is only slightly better than what was torn down.

The Ocean Park area of Santa Monica, immediately to the north of Venice, is similar in its socio-economic makeup to the canal area. The former is, however, denser in population, much cleaner, more attractive and far better kept up than the latter. It is still a predominantly low-income area, with a large number of elderly residents. The forces seeking to change Venice also operate in Ocean Park, which in addition had the aspirations of the City of Santa Monica to contend with. An area along the Ocean about ten square blocks several years ago was condemned by the Community Redevelopment Agency. The City attempted to aid only about 40 percent of the residents, almost all of whom were elderly and tenants. People were told they would have been given priority in the two high-rise apartments which

were subsequently erected on the part of the CRA site. This priority was a meaningless gesture, as rents in the new Santa Monica Shores Towers were about three times what they were in the courts and cottages that formerly filled the site. There is some talk that the CRA is interested in expanding. People in city government talk openly of wanting to get rid of the rest of the old poor people.

I. PROPERTY TAX

Debt servicing aside, the property tax is generally the single most substantial expense of the elderly homeowner. For example, the average owner of a modest, five room bungalow in a low-income section of Los Angeles would have paid approximately $550 in City and County property taxes in 1969 or about $46 a month. Although the budget for the forthcoming fiscal year has not yet been completed for either the City or County, it is estimated that taxes will run about 10 percent higher. And while most tax bills are fairly close to the $550 figure, many elderly people, because of new commercial activity near their homes, find themselves owing $700 or $800 each year.[1] The effect has been to force elderly pensioners to sell the houses they have lived in for decades.[2]

California currently has a Senior Citizens' Property Tax Assistance law (Revenue and Taxation Code § 19501 *et seq.*), enacted in 1967. This law provides "assistance to the claimant based on a percentage of the property tax accrued and paid by the claimant on his homestead. . . ." The assistance is equal to a designated percentage of property taxes paid on the assessed value of the property up to and including $5,000 (Revenue and Taxation Code § 19522). The percentage is set at 95 percent for an income of $1,000 and drops one point for each $25 increase in income. Thus at $2,400 a year, the average income for a couple on Social Security, the percentage would be 39 percent (Revenue and Taxation Code § 19523).

A. Flaws in Tax Assistance Approach

There are now pending before the California legislature several bills to increase and extend the amount of assistance. As an advocate for the elderly we support these bills. But, the tax assistance approach has several serious flaws.

In order to file a claim the taxpayer must present proof that he paid the tax (Revenue and Taxation Code § 19531). Thus the act is of no assistance to the elderly person who finds himself short of money at tax time. Secondly, from the point of view of efficiency, the procedure is much more cumbersome than merely allowing the claimants to take a deduction from his tax bill. Thirdly, the existence of the act is apparently not widely known. Last year, for instance, only 64,000 claimants were paid refunds, the majority of them from Los Angeles County. While the total number of eligible people cannot be known precisely, it would appear to be considerably greater than this.

[1] The above figures are based on telephone conversations the writer had with personnel of the Los Angeles County Assessor's office on June 29, 1970.

[2] Januta: "The Municipal Revenue Crises": 56 *California Law Review* 1525, 1534 (1968). And it should be noted that homeownership among the elderly is widespread in Southern California. According to the 1960 census of persons in the Los Angeles-Orange County area, of persons 60 years old or over 515,439 lived in owner-occupied units, while only 313,877 lived in rental units. Many of these persons are poor. The same census indicates that 263,613 households with a member 60 years old or older had an income of under $3000 a year.

Finally, to the extent that senior citizens are relieved of property taxes, the burden is partially shifted to other poor persons, either directly or indirectly in the form of higher rents.

For the above reasons it is clear that a system of assistance is not the optimum way of dealing with the problem of the tax. Further, the assistance plan does nothing to alleviate the many other deleterious effects of the tax. Much of the recent increase in rents in the Los Angeles area, though not the entirety by any means, can be laid to the recent rise in property taxes. More importantly, the property tax is extremely difficult, if not impossible, to administer equitably. While the amount of a person's income or the sales price of goods are generally clear-cut, ascertainable matters, the value of land is "to a very large extent a matter of opinion" (*Eastern Columbia, Inc.* v. *County of Los Angeles*, 61 Cal. App. 734, 745 (1944)) about which even well intentioned assessors can and do make mistakes. And, assessors are not always well-intentioned. (see e.g. *People* v. *Wolden*, 255 Cal. 2d 798 (1968))

B. Regressive in the Extreme

The tax is regressive in the extreme. Elderly people with lower than average incomes pay a higher than average percentage of their total family income for property taxes. "The percentage of income which California families in the two lowest income groups, under $2000–$2999 annually, pay for property taxes is almost twice that of families in the highest income groups of $10,000 and above.[3]

Another pervasive and undesirable side effect of the tax is that it discourages new construction, remodeling and replacement while encouraging slums.

> The process of blight is induced and hastened to a large degree by high taxes on urban improvements and irrationally drawn tax districts. High taxes on improvements can lead to blight in urban areas by inducing owners not to rebuild or repair their structures, but to invest in securities, machinery etc. or real property in areas of low [sic] taxation outside the urban center. Taxation of business properties in some urban areas at rates up to 20 percent of gross receipts may well induce firms to operate in run down structures rather than invest in rehabilitation which increases property taxes. The ad valorem tax on improvements decreases the incentive to invest in improvements by lowering the marginal revenue generated by each dollar invested in land use in at least two ways. Depending upon the tax rate and the before-tax rate of return on a particular investment, the property tax may prohibit the investment by lowering its overall rate of return below that which could be obtained elsewhere at a comparable risk. On the other hand, the tax may induce less intensive land use by lowering the point at which marginal cost and marginal revenue projections for the investment intersect. This result will obtain where an investor is willing and able to generate a satisfactory rate of return by scaling down his development—reducing his investment. Large financial institutions and similar firms that are "locked in" in the center city are most likely to fill this investor's role.

[3] See the *Municipal Revenue Crisis*, *supra* note 2 at p. 1533.

> The adverse effects of high taxes on improvements in urban areas are even greater when tax rates are low in nearby communities. Lower rates in a nearby community can induce investment in that area rather than in center-city improvements. The significance of variations in tax rates is shown by the fact that the tax differential between an urban location with a full value tax rate of 3 per cent and a suburban site with a 2 percent tax is $10,000 per year on a $1,000,000 investment. Over the life of an investment property this cost can be quite significant.[4]

It seems that not only the investor, who is expected to have an expertise in economic relationships, but even the average homeowner is aware of, and affected by, this negative aspect of the property tax. A member of the San Francisco Redevelopment Agency has testified that:

> . . . we discovered that *very often* when homeowners wanted to make repairs that the feeling was a great deal that the best way to have your home reassessed (and the property tax increased) was to take out a (building, remodeling, or repair) permit, *no matter how small.* Businessmen, likewise, have to decide whether the goodwill created by a new or remodeled building will offset the increased tax cost.[5] (Emphasis added)

C. Inadequate Source of Revenue

Then, too, the need for an expanding tax base has forced and will continue to force many communities to turn their backs on public housing, charitably sponsored nursing homes, nonprofit 236 housing for the elderly, parks, churches and other land uses of benefit to the elderly when these uses take property off the tax rolls. And finally, the property tax is no longer adequate as a source of revenue to supply the services the elderly so badly need.[6]

Although for a long period the property tax—the basic source of revenue for local government [7] remained obscure in its nature and effects,[8] several recent investigations into the problems posed by the tax have been made.[9] These proposals have for the most part concluded that some return of Federal money to the States and/or counties and cities is the only satisfactory resolution of this problem. This return of funds, generally known as Federal revenue sharing, is based on the premise that the Federal income tax is the most efficient and equitable means of raising money, and that this efficiency and equity should be put at the disposal of local government.

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[4] 20 Ad. Law Rev. 328 (1968). And see hearings on Urban America: Goals and Problems before Subcommittee on Urban Affairs of the Joint Economic Committee of the 90th Cong., 1st Session, pp. 90-91 Oct. 2, 1967, in a special reprint for the use of the Joint Economic Committee.

[5] *Municipal Revenue Crisis, supra* note 3 at page 1533.

[6] *See Municipal Revenue Crisis supra* note 3, p. 1539.

[7] For the twelve month period ending June 30, 1967, the property tax accounted for ⅞ of the $29 billion in tax revenue collected by local government. Gillespie, "Urban Affairs—The Property Tax and Urbanization," 21 *Administrative Law Review 319* (1969).

[8] Gillespie, supra at note 7.

[9] Heller, "Revenue Sharing and the City" (1968); Wm. G. Colerme, "Revenue Sharing: Problems and Prospects," 1 Urban Law Review 34 (1969); D. Januta, "The Municipal Revenue Crisis: California Problems and Possibilities," 56 *California Law Review* 1525 (1968). And see sources collected in Turnbull, "Restricted and Unrestricted Federal Grant," 2 *Urban Lawyer* 63 (1970).

Among proponents of revenue sharing, there is still debate concerning:

—Formulas for apportioning the money among the States,
—The extent to which the funds should go to State governments,
—Whether funds should be passed through directly to the cities and counties, and
—The extent and nature of controls and restrictions Congress and the Executive Branch should place on how the money is used.

Although there is widespread agreement that the property tax is inadequate to raise sufficient revenue for local governmental functions, there is still opposition to Federal revenue sharing. Some opponents argue that Federal sharing will further erode State and local governments and cause an unhealthy centralization in Washington. Others oppose revenue sharing because it would limit or eliminate present controls for receipt of Federal categorical aid.

This paper does not purport to be a comprehensive analysis of a problem whose ramification has filled volumes. Rather, the writer simply wishes to direct the attention of the Senate Special Committee on Aging to the heavy burden placed on senior citizens by the present system of local government financing, and the inability of superficial measures such as tax assistance to lighten the burden. The committee in order to protect the elderly must join the search for alternatives to this present inequitable system.

II. THE WORKABLE PROGRAM FOR COMMUNITY IMPROVEMENT

The Workable Program for Community Improvement is a document which a governmental entity must submit to the United States Department of Housing and Urban Development for certification as a prerequisite to certain types of Federal assistance.

The basic requirement for a Workable Program as a prerequisite to Urban Renewal and Neighborhood Development program Federal assistance is set forth in Section 101(c) of the Housing Act of 1949. According to that statute, the Workable Program . . .

> shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life . . . (and shall be directed toward) utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program. . . .[10]

The Secretary of HUD is required by statute to review the Workable Program submitted by each governmental body and to determine "that such program meets the requirements of this subsection and

[10] P.L. 81-171, 63 Stat. 413-414. 42 U.S.C. § 1451.

certifies that the Federal assistance may be made available to such community." [11]

A certification by the Secretary of HUD of a Workable Program is for a two-year period.

The Workable Program requirement is a prerequisite for the following programs:

1. The Urban Renewal Program;
2. The Neighborhood Development Program;
3. The Concentrated Code Enforcement Program;
4. The Interim Assistance for Blighted Areas Program;
5. The Demolition Grant Program;
6. The Community Renewal Program;
7. The General Neighborhood Renewal Plan;
8. Section 312 loans and Section 115 grants;
9. Section 220 FHA mortgage insurance program.

Further, contracts for Urban Renewal and Neighborhood Development Programs cannot be signed unless the Secretary determines that the Workable Program is "of sufficient scope and content to furnish a basis for evaluation of the need for the particular project" and that project "is in accord with the program." [12]

A. Purpose

In discussing the function of a Workable Program, a HUD handbook states:

> The basic purpose of the Workable Program requirement is to ensure that communities desiring to utilize funds for renewal and housing programs understand the array of forces that create slums and blight and are willing to recognize and take the steps within their power to prevent and overcome urban blight.[13]

To that end and under its rulemaking powers HUD promulgated the Workable Program handbook, setting forth the requirements to be followed by the community in its application for certification. The handbook requires that the city show progress in the following four areas:

1. Code adoption and enforcement,
2. Planning and programming,
3. Housing and relocation, and
4. Citizen involvement.

> . . . the application must clearly and specifically describe what the community intends to do during the next certification period in each of the four Workable Program elements. When applying for recertification, the application must also clearly describe what steps the community took in the last period, in order to progress toward meeting the agreed-upon goals and objectives. In developing its "work program" in each of the four elements for the next certification period, the community must also show how the

[11] 42 U.S.C. § 1451(c).
[12] 42 U.S.C. § 1451(e).
[13] The Workable Program for Community Improvement Handbook RHA 7100.1, Chapter 1, para. 2.

proposed activities are related to an analysis of the problems or needs, and to longer-range targets for accomplishment.[14]

A more detailed analysis of the policies, requirements and guidelines will be found in the various chapters of the handbooks. To give but one instance in the application the community must show that the relocation program will:

a. Provide services equal to those required under the urban renewal program, to ensure satisfactory relocation of all persons and businesses displaced. Such services include:
   (1) Prompt handling of authorized relocation payments.
   (2) Establishment of a housing referral system, based upon listing of units which have been inspected and found to be standard.
   (3) Development of a system for assuring, through interviewing, counseling, and referral, that the social and economic needs of those displaced are met.
b. Provide the capability and means for determining the housing needs of those to be displaced during the next certification period by required unit size and rent level or sales price, in relation to the available resources.[15]

For most of its history the Workable Program has been a formality—an ill-prepared and ill-reviewed document that bore little if any relation either to the needs of low-income younger or older people or to what was actually happening in the community under question. HUD did not enforce its own regulations. HUD made no independent investigation of facts and statements contained in the application, nor requested facts and statements regarding allegations of compliance left out altogether.

B. Litigation

The advent of a strong desire on the part of the urban poor to protect their rights has remarkably altered this picture. Beginning in January of this year, citizen groups have filed complaints with HUD charging serious and substantial deficiencies in their community's workable program application and asking that the application in question not be certified.

For example, a complaint was recently filed in Los Angeles on behalf of several elderly and community groups. It alleged that the City did not have:

(1) an adequate program to relocate families to be displaced by governmental action during the two-year certification period,

(2) a program to expand the supply of low- and moderate-income housing, and

(3) adequate citizen participation in the planning and programming of its projects.

The Secretary of HUD agreed with at least some of the allegations in the complaint and refused to grant the city a full two-year certification.

[14] *Ibid.*, chapter 2, para. 2.
[15] *Ibid.*, chapter 6, para. 2.

Applications made by other cities, notably Camden, New Jersey, and Oakland, California, have also been turned down on the basis of charges made by citizens and substantiated by HUD investigation.

Because HUD is now insisting that the workable program requirements mean what they say and that rights granted to poor people by Congress will be, at least to a limited extent, enforced, several civic organizations have suggested that the requirement be abolished.

It is submitted that the abolition of the requirement would be a serious mistake. The workable program is the only document subject to Federal scrutiny in which a community must bring together the totality of its plans for dealing with the problems of blight and slum. Other documents which a city must submit to the Federal government concern only the specific problems of specific limited neighborhoods and are reviewed by HUD on an ad hoc basis, without considering the effect of one particular project on any others.

The planning tool allowing the Federal government to obtain an overview of a community's entire planning program gives protection to the interests of low-income tenants and owners. Only by looking at planning as a whole can the Federal government determine if, in fact, the city's plans will prevent the spread of slums, will expand the supply of low- and moderate-income housing or will work toward any of the other goals Congress has mandated those cities receiving Federal assistance to accomplish.

It is submitted that the elimination of the workable program requirements will enable local governments to ignore the word of Congress and the plight of the poor, and especially the elderly poor.

III. CODE ENFORCEMENT

A city's rigorous enforcements of its buildings and housing codes has generally been regarded as something beneficial to the interests of the poor and underprivileged. And, in fact, many important advances have been made in the past through code enforcement.

> For example, through energetic code enforcement programs, central heating was made a reality for New York City; outdoor water closets were removed in Baltimore; dilapidated backyard sheds and fences were removed in Washington, D.C.[16]

A. A Menace For The Elderly?

But code enforcement has failed to improve standards of maintenance effectively, and for the elderly citizen, code enforcement has become a menace to his well being, comfort and perhaps even his life.

The basics of the problem can be stated very simply. The older person generally owns an older house. Older houses are often in violation of city codes and the older person, being on a fixed income, does not have the resources at his command to make the necessary repairs. In the older person's experience, the arrival of the building inspector is often followed by the loss of his house.

[16] Peter Salsich, Jr., "Housing and the States", 2 *The Urban Lawyer* 40 (1970).

In Los Angeles, to illustrate the problem more fully, upon the completion of an inspection a written report is filed. (Los Angeles Municipal Code (hereafter LAMC) Sec. 96.104). If the Superintendent of Buildings determines that there is probable cause to believe that the building is a substandard or dangerous residential building, he may request that the matter be set for hearing. (LAMC § 96.105) Following notice and hearing, the structure may be ordered to be repaired, if it can reasonably be repaired, vacated if it is in such condition as to make it dangerous to health, morals, safety or general welfare, and demolished if it is 50 percent damaged, decayed or deteriorated. If the owner fails to comply with the order, the department itself may carry it out and assess costs as a tax lien against the property.

It is when the elderly person receives the order to repair or vacate that he is approached by a buyer who offers the now confused and upset senior citizen a price considerably below the property's market value. Often the buyer will give the owner misinformation about the order's legal effect or the owner's right to appeal or in some other way stimulate the owner's sense of panic. In any event, the resultant forced sale is a cause of great heartache to the owner.

Many senior citizens believe that periods of intensive code enforcement are instigated by speculators anxious to buy up property in the enforcement area. It is not chance, many informants have indicated, that brings the buyer hard on the heels of the building inspector. It is further alleged that only the small, elderly and defenseless homeowner is hit by code enforcement and not the owner of apartment units. It should be noted that in at least one other city, St. Louis, similar beliefs prevail among homeowners.[17]

The writer has not yet had the opportunity to undertake a full investigation of the problem. If the charges of fraud and discrimination are correct and provable, then the matter is one for litigation. But the writer believes that the cases brought to his attention could well have been the result of an honestly run code enforcement program and that it is the program itself which may have been the problem.

Assuming that the latter conclusion is correct, the following is proposed:

1. That there be written into the Workable Program the requirement that multi-family units be given priority as objects of code enforcement in the community's program.
2. That no single-family structure owned and occupied by an elderly person be ordered repaired, vacated or demolished unless (a) the building is dangerous to the *physical* health or safety of the occupants or (b) the city can make available to the owner-occupant money from § 115 grants and § 312 loan funds sufficient to cover the full cost of the needed repairs and rehabilitation.
3. That wherever the cost of servicing a loan under § 312 will bring the total cost (including taxes) of maintaining the home to a sum greater than 25 percent of the household income, the city grant the household a property tax deduction equal to the difference between the total cost of maintenance and 25 percent of the household income.

[17] *Ibid.*, p. 45.

IV. ABANDONED BUILDINGS

Recently some attention has been focused on the problem of the abandoned building, lying empty and unusable in the midst of urban areas desperately short of vacant units. While the total of abandoned units is not known with anything like precision, some statistics do exist. It has been estimated that in New York City there are over 38,000 units and in Philadelphia between 16,000 and 18,000 units. In Detroit there are some 13,000 abandoned buildings, while in the Anacostia section of Washington, whole blocks are deserted.[18]

> The forces which have brought about this state of affairs are varied. First, owners are caught in a cost-price squeeze. Buildings simply cannot generate sufficient revenue to make major repairs because their tenants cannot afford the necessary rents. In order to cut their losses, owners cut their services, continuing their disinvestment, by closing their property and ultimately by abandonment. Secondly, rehabilitation capital is almost unattainable and existing mortgages are often unrenewable. Specific factors at work include rising maintenance and rehabilitation costs, high turnover, delayed or forgone payments, increased tenant militancy, and exercise of legitimate legal remedies including rent strikes, theft and vandalism by tenants and addicts, and freeways passing nearby.
>
> Given the increasing age of buildings, rapidly increasing construction costs, growing black-white tension and determination on the part of blacks to control their own environment, there is every reason to believe that the rate of abandonment will continue to rise.[19]

An abandoned building not only means several more units unavailable to meet a desparate need, it is, as well, a serious threat to the heath and safety of the city. For children, the building is an attractive and dangerous nuisance. For criminals and delinquents, it is a convenient meeting place. It is also a site in which a fire could break out unnoticed, a structure from which debris could suddenly topple on to the sidewalk, and a breeding place for rats.

Despite the serious problems posed by these buildings, to date, no city has mounted a coordinated and coherent campaign to deal with them. The failure is both one of civic imagination and civic financing.

It is submitted that the Federal government introduce a program to cope with this problem. Such a program would require the city to turn over the buildings to certain specified types of developers. In return the Federal government would reimburse the city for certain losses in tax revenue it might accordingly suffer.

It is proposed therefore that under such a program:

1. *A legal definition of an abandoned structure be formulated.* One of the threshold problems is that a city cannot deal with an abandoned building as such, but rather can deal with it only in terms of tax delinquency and code enforcement.[20]

[18] *New York Times*, February 9, 1970, p. 35, Col. 1. Recently, the Housing Committee of the National Urban League announced its intention to launch a nationwide survey of abandoned buildings. 1 Urban League Housing News No. 2, June 1970.

[19] Sheldon L. Schreiberg, "Abandoned Buildings: Tenant Condominiums and Community Redevelopment", 2 *The Urban Lawyer*, 193, (1970).

[20] *Ibid.*

Such a definition would take into account whether the structure was single family, multi-family or commercial, whether it was occupied or not, whether the occupants were paying rent and to whom, the extent of recent repairs and code violations and whether the owner of record could be determined and traced.

2. *A procedure for the location of abandoned buildings be added to the existing code enforcement program and be given priority over other types of code enforcement.* At the present moment unused and cast-aside structures come to the attention of city governments in a random, haphazard way, if at all.

3. *An accelerated procedure be developed whereby the city could secure good and transferable title to the property in question.* It is submitted that the city cannot deal adequately with the problems such buildings pose unless full title can be obtained. In New York and in Los Angeles the city can acquire full title only through in rem proceedings brought after four years of tax delinquency. In actual practice at least six years generally will elapse between the time an owner ceases to exercise control over his property and the time title to it passes to the city. This writer believes that a similar time lag exists in other cities. Given the desperate shortage of housing in most urban areas, low-income people cannot afford to wait while the present tax delinquency procedure grinds its way to completion.[21]

It might be noted that the other existing procedure for dealing with such structures is also not satisfactory. Under normal code enforcement proceedings the city may repair, vacate, or demolish the building and assess its costs as a lien against the property. While this does eliminate the building as a hazard it does nothing to convert the site to productive use. To accomplish this the city must still wait to complete delinquency proceedings.

The accelerated abandonment procedure would follow that used in normal code enforcement matters and will make provision for adequate notice, a full hearing, administrative appeal and judicial review. As in code enforcement proceedings and unlike condemnation actions no compensation will be paid to the former owner.

4. *The structure or site be used in the best interests of the residents of the neighborhood in which it is located.* In most cities, following in rem proceedings, the property is sold at auction to the highest bidder. The city makes no inquiry into what use the new purchaser will make of the property. In New York this is required by State law, in Los Angeles by the Municipal Code. In both cases the city has a justifiable need to satisfy its tax lien and to restore the derelict property to the tax rolls. In any event, there is no evidence that selling to the highest bidder is an effective way of curbing slums, alleviating blight or loosening the present tight housing market.

A program committing the city to using abandoned buildings must set forth guidelines for several interrelated policy decisions.

a. *Type of site use.*—While the discussion up until now has assumed that housing is the most crucial need of low-income areas, it should be noted that there are other needs as well—recreational, educational, medical—whose fulfillment would

[21] The Attorney General of New Jersey has agreed to use the State's powers to condemn abandoned properties in order to avoid the lengthy tax foreclosure process (HUD News, July 1970).

be greatly assisted by free land. It is contemplated, of course, that the transfer would be at no or minimal cost to the recipient.

b. *Type of developer or sponsor.*—The guidelines must keep in mind on the one hand the need for flexibility and experimentation and on the other the need to avoid the opportunities for fraud and favoritism that are potential to a program of this sort. Several possible approaches to the problem are set forth in Schreiberg, "Abandoned Buildings," supra, n. 19, at pp. 193–200. In all cases, of course, rehabilitation or development of housing must result in units available to low- and moderate-income people.

c. *Community access to land.*—Means must be developed to provide notice of the availability of land to the low-income community. Traditional methods, such as advertisements in legal papers, bulletins on the courthouse wall, are not effective in this regard. Cities should be encouraged to advertise in senior citizen newsletters, church publications, black and brown newspapers, as well as to post comprehensible, and, if necessary, multilingual announcements on the site.

d. *Degree of civic ownership retained.*—In a program of this sort, a certain percentage of projects will fail. For this and other reasons it may be necessary to give the developer only a limited interest in the site.

e. *Standards for development and rehabilitation.*—It would be advisable to use the standards already developed for the FHA 235 and 236 programs. Most developments, in fact, will probably be under these programs. In all cases guidelines should insure that the sites do not revert to their delinquency conditions.

5. *A coherent, community-wide plan be developed to coordinate the use of individual sites with each other and with other federally-assisted projects.*—If this program is to be an effective means of rejuvenating neighborhoods, each site cannot be developed on an ad hoc basis. Comprehensive planning is aided by the fact that abandoned buildings tend to cluster together, one deserted building causing an entire block to be abandoned.

6. *The disposition of abandoned building sites be coordinated with the disposition of other civic-owned land not needed for governmental purposes.*—Apart from land acquired after in rem tax delinquency proceedings other parcels of land are from time to time auctioned off by city governments. In selling such land, the responsible city government is generally not required by law to take into account either the community's over-all planning goals or the needs of the low-income residents. Frequently in Los Angeles one city department will sell land at low bid in a neighborhood in which, shortly thereafter another department will buy land at a high condemnation price. This short-sighted lack of policy works a serious waste of scarce civic resources and cuts down on the city's effectiveness in dealing with slums and blight.

It is suggested that as a requirement for participation, cities inventory land under their ownership [22] and make all or a portion of such land which otherwise would be disposed of as surplus property, available for low-income uses under this program.

7. *The Federal Government, through the Department of Housing and Urban Development, reimburse the city for loss of tax revenue resulting from participation in this program.*—It is contemplated that the city will transfer the site to the appropriate developer at no cost. The Federal Government will then transfer to the city an amount equal to the liens due and owing on the site. Additionally, to encourage the city to use great flexibility in making land transfers, to the extent the transfer would decrease the tax the land would otherwise yield, the Government will pay to the city for a ten-year period a sum equal to the difference between the tax revenue actually recovered from the land and the revenue the land would have yielded had it been taxed according to its highest and best usage. This would encourage the city to turn land over to uses for the aged, which are generally tax exempt.

[22] The city of Los Angeles, for instance, does not at this point have an inventory of the land it owns.

CHAPTER FOUR

OPPORTUNITIES FOR ACTION BY STATES

Concerned as it is about the impact of Federal programs on individual older Americans, the Senate Special Committee on Aging recognizes that State governments can take many actions to meet legal needs of the elderly.

The brief recital of several of the legal problems affecting the elderly in housing, Federal benefit programs, and health care hardly exhausts the field. Many knowledgeable persons can describe, for example, the thousands of aged persons warehoused in mental hospitals and in nursing, convalescent, rest, and foster care homes—receiving inadequate or perhaps no medical or psychological treatment.

Others can tell of the refusal of private hospitals or other health care institutions to accept indigent elderly patients even when Medicare and Medicaid eligibility is established; the inadequacy of many municipal hospitals to which the bulk of the poor are referred; the consumer frauds practiced on the elderly by predatory salesmen; the need of supportive services and legal guardians to care for the elderly who should not be institutionalized; and the need for public conservators to manage the meager property of the poor when they become infirm.

Early in the operations of the Legal Research and Services program it became evident that a State legislative program could both substantially benefit the elderly and bring uniformity and cohesion to local policies and practices. In January 1970, all project attorneys met in Washington to discuss State and local legislative needs. In May, a grant was made to the University of Michigan Law School, under the supervision of Prof. William J. Pierce, to draft model statutes and prepare related research. We believe these measures will strengthen State and local capacity to fashion social welfare services and benefits.

Appended to this report is a package of legislation introduced in 1970 to the Massachusetts General Court (the State legislature). It was prepared for the Council of Elders in Roxbury, a Legal Research and Services for the Elderly grantee, by Morris M. Goldings. Mr. Goldings is a partner in Mahoney, McGrath, Atwood, Piper & Goldings, the Boston law firm retained under the grant. A review of these measures will indicate the diversity of legislative problems facing the elderly.

APPENDIX A

MODEL LEGISLATION FOR THE ELDERLY

The following eight bills were submitted to the 1970 session of the Massachusetts General Court by the Council of Elders. With headquarters in Roxbury, the council is comprised of the elderly residents of the Boston model cities area—Roxbury, North Dorchester, and Jamaica Plain. Through a grant from Legal Research and Services for the Elderly, the private law firm of Mahoney, McGrath, Atwood, Piper & Goldings was retained to represent the council.

The Social Security "pass through" bill has been enacted. Approximately 70,000 recipients of old-age assistance were affected. The law excludes $12 of the recent Social Security benefit increase from consideration as "income," preventing a corresponding deduction from the assistance payment.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Authorizing public utilities and common carriers to give free or reduced rate service to the elderly

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. It is hereby declared that many elderly persons reside in the commonwealth whose annual net income from all sources is less than the amount necessary to enable them to maintain decent living conditions in the inflationary economy presently existing and whose income is fixed in whole or in part so as to be not adjusted to such an economy; that the provision of the services of public utilities, including gas, electric and telephone, at rates reduced from inflationary levels is a necessity of life for such persons so that they may be able to protect themselves from the adversities of old age by continuing to live in private or family units; that the lack of such services at such rates tends to cause an increase and spread of diseases, including communicable and chronic diseases by depriving such persons of ample access to heating, cooking, and emergency medical facilities; that such a condition aggravates those diseases and illnesses peculiar to the elderly, thereby crowding the hospitals and other institutions in the commonwealth with elderly persons under conditions of idleness than inevitable invite senility; that this situation constitutes a menance to the health, safety, welfare and comfort of the inhabitants of the commonwealth; that a public exigency exists which makes the provision of reduced rate services to the elderly by public utilities a public necessity; that the provision of such rates for the purpose of reducing the cost to the commonwealth of their maintenance and care by promoting their health and welfare, thereby prolonging their productivity in the interest of the state and nation, constitutes and hereby is declared to be a public purpose necessary for the preservation of the public convenience.

SEC. 2. Section 15 of chapter 159 of the General Laws, as most recently amended by section 13 of chapter 535 of the acts of 1966, is hereby further amended by adding at the end thereof the following: "nor shall this section or any other provision of law prohibit the giving by any common carrier of free or reduced rate service to an elderly person as defined by the department."

SEC. 3. Section 97 of chapter 164 of the General Laws, as most recently amended by section1 of chapter 615 of the acts of 1963 is hereby further amended by adding at the end of the second paragraph thereof the following: "Any order by the department under this section may direct changes in any schedule so as to result in free or reduced rate service to an elderly person as defined by the department."

SEC. 4. It is hereby declared that this act is intended to complement authority

presently existing in the commonwealth for the approval by the Department of Public Utilities of free or reduced rate service to the elderly as constituting a chartable purpose and nothing in this act shall be interpreted as expressing a legislative finding or intent that the power to give such approval was lacking prior to the effective date of this act.

SEC. 5. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Requiring a reduced rate of at least fifty percent by gas, electric and telephone companies for service to the elderly

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. It is hereby declared that many elderly persons reside in the commonwealth whose annual net income from all sources is less than the amount necessary to enable them to maintain decent living conditions in the inflationary economy presently existing and whose income is fixed in whole or in part so as to be not adjusted to such an economy; that the provision of the services of public utilities, including gas, electric and telephone, at rates reduced from the inflationary levels is a necessity of life for such persons so that they may be able to protect themselves from the adversities of old age by continuing to live in private or family units; that the lack of such services at such rates tends to cause an increase and spread of diseases, including communicable and chronic diseases, by depriving such persons of ample access to heating, cooking, and emergency medical facilities; that such a condition aggravates those diseases and illnesses peculiar to the elderly, thereby crowding the hospitals and other institutions in the commonwealth with elderly persons under conditions of idleness that inevitably invite senility; that this situation constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the commonwealth; that a public exigency exists which makes the provision of reduced rate services to the elderly by public utilities a public necessity; that the provision of such rates for the purpose of reducing the cost to the commonwealth of their maintenance and care by promoting their health and welfare, thereby prolonging their productivity in the interest of the state and nation, constitutes and hereby is declared to be a public purpose necessary for the preservation of the public convenience.

SEC. 2. Chapter 25 of the General Laws is hereby amended by inserting after section 9 a new section as follows:

"SEC. 9A. The department shall not approve rates or schedules for gas, electric and telephone companies unless such rates or schedules include provisions granting a reduced rate of at least fifty percent to all elderly persons. As used herein the term 'elderly persons' shall mean persons sixty-two years of age or older who are subscribers for gas, electric or telephone service and who do not share such subscription with more than one other person in the same dwelling unit who is less than sixty-two years of age. The department shall adopt and, from time to time, review and, if necessary, modify procedures for the prompt, fair and efficient establishment and maintenance of such reduced rates and schedules by all gas, electric and telephone companies."

SEC. 3. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Requiring the establishment of specialized branch offices of the department of public welfare to administer programs relating to the elderly

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 5 of chapter 18 of the General Laws, as amended by section 4 of chapter 885 of the acts of 1969, is hereby further amended by adding at the end of the fourth paragraph the following sentences: "One or more branch offices shall be established for the specialized administration of programs under the jurisdiction of the department particularly relating to the elderly and shall be limited to such specialized administration. In establishing branch offices, the commissioner and the state advisory board shall insofar as possible make use of

existing facilities maintained by voluntary or private agencies or organizations and may lease premises and facilities from such agencies or organizations. Any such lease shall not be subject to the provisions of Section ten A of chapter eight."

SEC. 2. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Prohibiting the reduction of old-age assistance on account of increases in social security benefits

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 118A of the General Laws, as most recently amended by section 1 of chapter 687 of the acts of 1968, is hereby further amended by adding at the end of the first paragraph the following sentence: "The department shall not reduce the amount of such assistance, or fail to grant or increase such assistance, or reduce budgetary standards on account of any increases in sums received by the aged person from programs administered under the Federal Social Security Act."

SEC. 2. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Providing for public conservators

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after Chapter 194 the following new chapter:

"CHAPTER 194A

"PUBLIC CONSERVATORS

"SECTION 1. There shall be in each county one or more public conservators, not exceeding six each in Middlesex and in Suffolk and five in any other county, appointed by the governor, who shall hold office for five years from the time of their appointment.

"SEC. 2. A public conservator shall give bond for the faithful performance of each estate as to which he is appointed conservator with sufficient sureties or without sureties and in such form as the probate court may order, payable to the commonwealth with conditions substantially as required for a bond of a conservator under section nineteen of chapter two hundred one.

"SEC. 3. A public conservator shall petition the probate court for appointment as conservator of any person who by reason of advanced age, mental weakness, or physical incapacity is inable to properly care for his property and who has no known husband, widow, heirs apparent or presumptive or friend living in the commonwealth at the time of filing the petition who is capable to properly care for the property of such person.

"SEC. 4. Upon the filing of such petition the court shall appoint a time and place for a hearing, and shall cause not less than seven days' notice thereof to be given to the person for whom a conservator is to be appointed, except that the court may for cause shown direct that a shorter notice be given. If the court finds that the welfare of the person requires the immediate appointment of a public conservator, such appointment may be made without notice, in which event notice of not less than seven days shall be given to show cause why the appointment shall be continued or terminated. All notices hereunder shall also be given to the heirs apparent or presumptive of such person, including the husband or wife, if any, and if such person is entitled to any benefit, estate or income paid or payable through the United States Veterans' Administration to such agency, and to the commissioner of public welfare.

"SEC. 5. The petition of a public conservator shall not be granted when the husband, widow or an heir apparent or presumptive of the person, in writing, claims the right of appointment as conservator and files a petition therefor praying for appointment of himself or herself or of some other suitable person, gives the bond required, and satisfies the probate court of the suitability of such appointment. Otherwise, the petition of a public conservator shall be granted if it appears to the probate court to be in the best interests of the person.

"SEC. 6. A public conservator shall have the same powers and duties as a conservator appointed under chapter two hundred one and shall render accounts in the same manner as other conservators.

"SEC. 7. A public conservator may be discharged from an estate by the probate court upon petition of the ward, or otherwise, when it appears that the conservatorship is no longer necessary. The court shall order notice on such petition as it shall deem appropriate.

"SEC. 8. A public conservator shall receive just and reasonable compensation for his services, and reimbursement for expenses actually incurred, in an amount approved by the probate court for such estate, such compensation to be payable out of the treasury of the commonwealth from funds appropriated therefor. In no event shall the compensation or expenses of a public conservator be paid or reimbursed out of the assets of the estate.

"SEC. 9. The probate court in each county shall require every public conservator in such county to render an account of his proceedings under any petitions for appointment at least once a year.

"SEC. 10. A public conservator shall, upon the appointment and qualification of his successor in office, render an account of all estates to the probate court, and, upon a just settlement of each such account, shall pay over and deliver to his successor all money remaining in his hands on such account, and all other property, effects and credits of each ward in his possession or under his control.

"SEC. 11. Upon the death, resignation or removal of a public conservator, the probate court shall issue a warrant to some other public conservator in the same county, requesting him to examine the account of such public conservator relative to the estates subject to his conservatorship, and to return to the probate court a statement of all such estates. Thereupon the court shall appoint the public conservator making the return as successor public conservator of each such estate.

"SEC. 12. This act shall take effect upon its passage."

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Making an appropriation for the special commission relative to the major needs and problems of elderly persons in the commonwealth

Whereas the deferred operation of this act would tend to defeat its purpose, which is to provide funds for the special commission established under chapter eighty-three of the resolves of 1969 for an investigation and study relative to the major needs and problems of elderly persons in the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. To provide for an investigation and study of the major needs and problems of elderly persons in the commonwealth, the state and municipal structures for administering to these problems, and other matters relevant thereto, the sum set forth in section 2 of the act is hereby made available from the General Fund, subject to the provisions of law regulating the disbursement of public funds and the approval thereof and the conditions pertaining to the appropriations in chapter 452 of the acts of nineteen hundred and sixty-nine.

SEC. 2.

GENERAL FUND

State Purposes Appropriation

Legislature

Special Investigations

Item: For an investigation and study relative to the major needs and problems of elderly persons in the commonwealth, the state and municipal structures for administering to these problems and other matters relative thereto as authorized by chapter eighty-three of the resolves of nineteen hundred and sixty-nine, $35,000.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Requiring the approval by the department of community affairs of forms of leases used in housing for the elderly

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 40 of chapter 121 B of the General Laws, as inserted by section 1 of chapter 751 of the acts of 1969, is hereby amended by adding at the end thereof the following paragraph:

"(g) No lease, occupancy agreement, or document relating to the tenancy of any elderly person shall be effective unless the precise form of such lease, agreement or document has been approved by the department. The department shall review all forms proposed for use as leases, occupancy agreement or other documents relating to tenancy promptly upon submission to it and shall not approve any form requiring security deposits or any similar deposit of sums for application toward unaccrued rent or other expenses nor shall the department approve any such form it it contains provisions deemed by the commissioner to be inequitable or contrary to public policy having due regard for the conditions of the tenants as elderly persons of low income. The provisions of this section shall apply to all elderly persons of low income residing in any housing within the commonwealth with respect to which any financial assistance has been given by the commonwealth, either directly or indirectly, or as to which the commonwealth has financially assisted the builder, owner or developer in any manner in connection with the construction, operation and maintenance of the said housing, or as to which any city or town of the commonwealth has financially assisted the builder, owner or developer in any manner in connection with the construction operation and maintenance of the said housing."

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Providing for the application of meal taxes toward financing programs to improve the nutrition of the elderly and repealing the means test for school lunch programs for the elderly

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Notwithstanding any other provision of law, the proceeds of the excise on meals levied under the provisions of chapter sixty-four B of the General Laws shall be paid into the state treasury and credited to the General Fund and shall be used solely toward meeting the expenses under programs presently existing and hereafter authorized for improving the nutrition of the elderly.

SEC. 2. Section 1 of chapter 703 of the acts of 1969 is hereby amended by deleting, from the first sentence of the last paragraph thereof, the words "whose monthly income and liquid assets do not exceed the limitations established for medical assistance for the aged in the commonwealth."

SEC. 3. This act shall take effect upon its passage.

APPENDIX B

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY: WORK THUS FAR

The earliest of the 12 subgrants by LRSE began May 15, 1969. Even in this brief period, the projects have become engaged in a formidable amount of litigation in cases seeking to protect and develop the rights of the elderly poor. The Center on Social Welfare Policy and Law at Columbia University has provided technical assistance to private attorneys and legal services projects throughout the Nation. The following case docket is incomplete but provides an accurate sampling of LRSE's litigation program to date.

CENTER FOR LEGAL PROBLEMS OF THE ELDERLY, CENTER ON SOCIAL WELFARE POLICY AND LAW, NEW YORK, N.Y.

1. Involuntary Commitment and Involuntary Detaining of Assets

a. *Dale v. Hahn* (New York)—Constitutionality of state law authorizing the summary appointment of a committee to manage the financial affairs of a person involuntarily committed to a state mental hospital. Plaintiff is a 68-year old woman committed in 1951 and discharged in 1967. The committee was appointed in 1962 and managed her affairs until one week before she was discharged. Plaintiff managed her own affairs from 1951 to 1962. The suit seeks to prevent deprivation of personal control over property without due process of law—notice, hearing, counsel, trial.

Defendant's motion to dismiss was granted March 27, 1970, by Judge Irving Ben Cooper and plaintiffs application for a three-judge court was denied. The decision seems to rest on the finding that Mrs. Dale did receive notice that a committee was to be appointed and did not request a hearing. Motion for Leave to Appeal *in forma pauperis* is pending. We are assisting New York Civil Liberties Union.

b. *Siegel v. Finch* (Minnesota)—Constitutionality of unilateral determination that a Social Security beneficiary is senile and unable to manage her affairs and the consequent action of suspending benefits until a "representative payee" is selected, both without a prior evidentiary hearing. The Plaintiff is a 73-year-old woman who has been receiving Social Security benefits since she was 62. Basis of suspension benefits was a medical report during the brief entry of Plaintiff into a nursing home. Husband asked to be appointed representative payee but Administrator refused. Legal Aid Society was appointed payee nearly three months later.

After the case was argued on Plaintiff's motion for a declaratory judgment and Defendant's motion to dismiss, HEW agreed to issue regulations requiring prior hearing and reasonable proof before cancelling benefits and appointing another payee. We are assisting Minneapolis Legal Aid Society.

c. *Roark v. Boyle* (Washington, D.C.)—*Amicus curiae* brief filed in U.S. Court of Appeals for the District of Columbia. This is a class action attacking the refusal of the United Mine Workers Welfare and Retirement Fund to pension workers who, although otherwise qualified, did not work their last year of employment in a union mine. Case is being handled by Landis, Cohen and Singman, Washington, D.C. On the brief are LRSE's West Virginia project director and David H. Marlin of the Washington office. The West Virginia project represents many retired miners, their widows and dependents.

d. *Jemison v. Robinson* (Washington, D.C.)—Constitutionality of District statute permitting involuntary transfer of patients committed to St. Elizabeth's

Hospital to previous jurisdiction because they did not reside in D.C. for one year prior to commitment. This class action affects elderly geriatric patients more than any other. *Amicus* memorandum filed before three judge District Court. Case awaiting decision. We are assisting D.C. Legal Aid Agency and Neighborhood Legal Services Project. Also on memorandum is David H. Marlin.

e. *Anderson v. Solomon* (Maryland)—Constitutionality of Maryland statute which permits ex parte involuntary commitments to mental hospitals. No requirement that persons committed without hearings be deemed dangerous to themselves or others. Hearing awaited on motion for preliminary injunction. Assisting Baltimore Legal Aid Society.

f. *Morgan v. United States* (New York)—Damage suit for unconstitutional mental commitment and failure to provide treatment. We are assisting a private attorney.

g. *Bryant v. Battle* (North Carolina)—Suit by doctor against deceased estate for medical services some of which were provided by him while deceased was covered by Medicare. We are assisting a private attorney.

2. Discrimination

a. *Richardson v. Graham* (Arizona); *Gonzales v. Shea* (Colorado); *Rhodes v. Roberts* (Florida); *Leger v. Sailer* (Pennsylvania); *Nikolits v. Bax* (Florida)—Constitutionality of excluding from old age and other public assistance benefits all aliens or those aliens who have not resided within the state for an excessively long time. For example: Arizona—15 years; Florida—20; New Hampshire—10; North Dakota—10; Texas—25. The Center has filed an *amicus curiae* brief in the *Richardson* case, which involves a 64-year old woman, formerly of Mexico, who has been repeatedly denied APTD benefits during her 13-year Arizona residence.

In the *Richardson* case, a three-judge court unanimously held the statute unconstitutional. The decision has been circulated to all attorneys with similar cases. In Arizona, we are assisting the Legal Aid Society of the Pima County Bar Association. The Center is assisting in the other cases listed above, as follows: Colorado, the Legal Aid Society of Metropolitan Denver; Florida, both Law, Inc. of Hillborough County and our project, Legal Services Senior Citizens Center, of Miami Beach; and Pennsylvania, Community Legal Services of Philadelphia. We are also assisting in cases in Texas and New Hampshire. On July 3, 1969, we asked HEW to prescribe regulations prohibiting conditioning all federally-aided public assistance on citizenship and residency.

b. *Negron v. Wallace* (New York)—At issue is the constitutional right to counsel of a person civilly incarcerated (juvenile in this instance) and the reasonableness of certain restrictions placed on that right. Plaintiff was arrested pursuant to a "person in need of supervision" petition and detained in a juvenile center. The court appointed a Legal Aid Society lawyer to represent her. Her previous lawyer was not notified of the arrest. When he found out about the arrest he was denied access to her during a weekend and until he was formally substituted by the Family Court.

U.S. District Judge Murphy held that counsel did have the right of access but that the administrative requirements of operating a civil commitment center permit the imposition of proof of a lawyer-client relationship and the restriction of certain hours for visitation. The reasonableness of the restrictions will be appealed. Motion to proceed *in forma pauperis* is pending. We are assisting CALS.

c. *Santiago v. Charge Account Corporation* (New York)—Constitutionality of a cash deposit or surety bond as a precondition for an indigent to open a default judgment. Secondly, the kinds of personal handicaps that excuse a person from neglect in timely reopening the judgment. The handicaps here are language and illiteracy. The briefs include aging as such an exculpatory handicap.

A petition has been filed with the New York Court of Appeals to modify the remand of the Appellate Division to the Civil Court that removed the preconditions but narrowed the scope of the matter at a rehearing. We are assisting Mobilization for Youth.

d. *Butler v. Jones* (Pennsylvania)—Constitutionality of State Bureau of Vocational Rehabilitation permitting the use of kidney machines only for those who are young and will return to the job market. Plaintiffs are suffering from chronic kidney failure and have been denied hemodialysis treatment previously supplied under a restorative vocational rehabilitation service for handicapped persons.

Case has been argued, briefs filed and decision is awaited. We are assisting Community Legal Services, Philadelphia.

e. *Gonzales v. Goldberg* (New York)—Habeas corpus action by grandfather to gain custody of grandson on his behalf as well as on behalf of his foster daughter, who lives with him and is the child's mother. At issue is the New York practice that permits children to be held by the welfare department without the mother having surrendered the child and without notice, hearing and a finding that the mother is unfit. Petitioner claims his age does not prevent his furnishing suitable home.

Petition filed. Awaiting trial. We are assisting CALS.

f. *In re Morris Albert* (Maryland)—Malpractice suit involving an elderly person's right to be apprised of his physical condition in order to make decisions about operations which would affect his health and life expectancy.

We are assisting a private attorney.

3. Elderly Benefit Programs

a. *Messer v. Finch* (Kentucky)—Constitutionality of arbitrary termination of Social Security disability benefits without a prior evidentiary hearing. Plaintiffs are a husband, wife and seven children (aged 2 to 16) that had been receiving disability insurance payments following the removal of the husband's right lung. He had been a coal miner in Clay County, Kentucky.

Case has been argued and decided unfavorably by a three-judge court. It will be appealed to the Supreme Court. We are assisting Howard Thorkelson, Prestonburg.

b. *Bartley v. Finch* (Kentucky)—Constitutionality of Social Security Act requiring reduction in disability insurance payments to off-set workmen's compensation benefits. Claim is there is a denial of equal protection in that payments are not reduced for persons receiving other forms of compensation for the injury. Plaintiffs are 24 residents of Kentucky.

The case has been argued before a three-judge court. A decision is awaited. We are assisting our project in Morehead, Kentucky that has become co-counsel with attorney Ronald W. May of Pikeville.

c. *Gainville v. Finch* (Massachusetts)—Constitutionality of the income limitation provision of the Social Security Act. Present law restricts outside earned income to $1680 per year without loss of OASDI benefits for persons below the age of 72. The test, brought by seven Plaintiffs who have lost, are losing and will lose benefits, is based on due process and equal protection arguments.

A petition for a three-judge court has been granted. We are assisting the law firm representing the Council of Elders (our Boston project), Mahoney, McGrath, Atwood, Piper and Goldings and the Boston Legal Assistance Project.

d. *In re Angel Matos* (New York)—Right of an applicant for Social Security disability benefits to cross-examine doctors and present medical evidence.

Case was decided favorably in U.S. District Court granting benefits retroactive to May 1967. We were assisting Mobilization For Youth. Now awaiting official HEW approval.

e. *Federici v. Ott* (Massachusetts)—Issue is whether lump sum retroactive Social Security benefits may be attached by a state that has furnished public assistance during the past period. Plaintiff is 65 and relinquished the retroactive benefits under threat of arrest and a law suit.

Argument has been held on cross-motions for summary judgment and decision is awaited. We are assisting the Boston Legal Assistance Project.

f. *Flory v. White* (Ohio)—Issue is the denial of assistance to an applicant because she had a pre-paid burial contract in excess of $400 and insurance in excess of $500. She failed to assign the insurance to adjust the burial agreement.

Mandamus has been denied by the Ohio Supreme Court. We are discussing an appeal.

g. *In re Anthony Russell* (New York)—Issue is the denial of benefits under the Social Security Act for an illegitimate child adopted by a recipient of disability insurance payments. The adoption occurred more than 24 months after applicant's last entitlement to benefits.

A hearing has been held and decision is awaited.

h. *Rothstein v. Wyman* (New York)—Constitutionality of state establishing different level of payments for public assistance based on geographic residence. Claim is that it is an equal protection violation and is contrary to the Social Security Act. Plaintiffs are aged, blind and disabled welfare recipients residing in Nassau and Westchester Counties.

Injunction granted by three-judge court but appealed to U.S. Supreme Court. We assisted throughout the Nassau County Law Services Committee and the Legal Aid Society of Westchester County. We have filed an *amicus curiae* brief

in the U.S. Supreme Court in conjunction with Nassau County. U.S. Supreme Court has remanded the case to the lower court to establish statutory claim. Will participate in filing supplemental brief.

i. *In re Robbins* (New York)—Issue is the retroactive recovery of "over payment" of Social Security benefits because of the income limitation.

Social Security Administration has agreed to pay requested benefits.

j. *In re Lola Howard* (Colorado)—Issue is denial of medicaid benefits because applicant had income above eligibility level although medical expenses will reduce income below that level.

Adverse hearing decision will be appealed.

k. *O'Reilly v. Wyman* (New York)—Constitutionality of a New York statute requiring the medically indigent not on welfare to pay 20 percent of the costs of out-patient care under the State Medicaid program. The attack on the co-insurance law was brought by several elderly plaintiffs as a class action.

A U.S. District Court judge issued a TRO to enjoin implementation of the law until the matter was heard by a three-judge court. That court dissolved the injunction after three months. The state delayed implementation until the regulations were changed so that the harm complained of was eliminated. The Center represented the Plaintiffs directly. We estimate the action of the Center saved $4,500,000 for the medically indigent of New York.

l. *In re Hahn* (New York)—Mrs. Hahn, eligible for Medicare, was a patient in a nursing home for 99 days. Notification was promptly made.

The carrier first requested information for processing her claim 8 days after she left the nursing home and then proceeded to deny payment because "non-covered" services were obstensibly rendered.

Request for reconsideration was made and is awaited. We are preparing for an administrative hearing and, if necessary, for judicial review.

Issues:

(1) Whether certification of medical necessity by the doctor or utilization review team is binding upon the carrier for purposes of determining whether covered services were rendered.

(2) Whether there are any binding time periods within which a determination must be made.

(3) Whether the provider agreement between the nursing home and Social Security prevents the nursing home from charging patients when payment has been denied by Medicare on the basis that non-covered services were rendered.

LEGAL SERVICES SENIOR CITIZENS CENTER, MIAMI BEACH, FLORIDA

1. *City of Miami Beach v. State of Florida.*—This is an action under state law to validate a bond issue of $350,000 voted on November 18, 1969, to purchase land for school purposes. The statute permits unlimited citizen intervention. We represent elderly clients who challenge the requirement that only freeholders (landowners) are allowed to vote. Most South Beach residents, of course, are not property owners.

2. *Nikolits v. Bax.*—Constitutional challenge to state law that conditions eligibility for old age assistance to citizens or aliens who have resided in the United States for at least 20 years. Plaintiff is an 88-year old woman who moved to Florida from Canada nearly five years ago. She is confined to a wheel chair and requires considerable care. The Center on Social Welfare Policy and Law of Columbia University is assisting.

3. *Goldberg v. Dade County.*—Mandamus action by the president of the Inter-Center President's Council of Senior Centers for the County to produce a study of Senior Centers allegedly completed in May, 1968 and to re-instate financial support for them. The purpose of the study was for the County's budget department to evaluate the quality of the centers and consider alternative methods of providing service to the elderly. Plaintiff was a member of the study group and has been denied the report.

4. *Kuntz v. Dade County.*—Constitutional challenge to County ordinance that prohibited residential picketing except when the residence is used as a place of business, or employment involved in a labor dispute, or for a public meeting. Suit was brought by Miami chapter of ACLU. We represented an intervening Plaintiff, Abraham Marcus, who is president of a large senior citizens club and vice-president of the Dade County Council of Senior Citizens. Marcus claimed

he had an immediate plan to picket the homes of Dade County Commissioners who voted to eliminate the Senior Centers hot meals program and who will not support lower bus fares for the elderly.

U.S. District Court Judge William Mehrtens ruled on April 7 that the statute was invalid as "overly broad on its face" as a violation of the First and Fourteenth Amendments.

5. *Dryspiel v. Berkman.*—Constitutionality of a Florida statute authorizing peace warrants be served after a citizen complaint at the discretion of a justice of the peace. Plaintiff allegedly insulted complainants and created a "disturbance." The suit alleges the statute is vague and infringes the right of free speech and expression. A motion to dismiss has been filed on the ground the case is moot because the warrant was vacated after this action was filed.

6. *Linder v. City of Miami Beach*—Suit alleges that a state law creating a two percent "resort tax" is void as its passage was technically faulty. The tax applies to all restaurant meals over 50 cents. Plaintiffs are leaders of the United Senior Citizens for Community Action, Inc. Plaintiffs hope that if the bill is voided the state will either not re-enact it or raise the minimum to $2.00. Case was decided adversely and has been appealed.

7. *Fleetwood Hotel, Inc. v. City of Miami Beach*—On October 15, 1969, the City of Miami Beach enacted a rent control ordinance that would particularly benefit elderly low-income residents. Four landlords brought suit, on behalf of 2,000 Miami Beach landlords, to enjoin the City from implementing the law. A state court judge invalidated the ordinance on May 5, 1970 on grounds that the City was without authority to promulgate rent control, that there was an unlawful delegation of legislative power and that the ordinance conflicted with other provisions of state law. We are assisting Atty. Tobias Simon of Miami, special counsel to the City, in the appeal.

8. *Mourning v. Family Publications, Inc.*—Class action charging that magazine subscriptions were sold in violation of the truth-in-lending law that requires contracts to contain the total amount of charges and fully disclose all terms and conditions. Hearing awaited in Federal court.

9. Two petitions to intervene have been filed. One would permit 27 Beach residents to join in the challenge to recently increased Dade County property tax assessments. The other opposes the attempt now in litigation to divide Miami Beach into six election districts instead of the present at-large elections. Senior citizen clients believe districting would dilute their vote and diminish their influence.

HOUSING OPPORTUNITIES FOR THE WEST SIDE ELDERLY

1. *East Los Angeles Welfare Rights Organization v. City of Los Angeles.*—Administrative complaint filed with the U.S. Department of Housing and Urban Development on behalf of 10 organizations of poor aged and minority city residents. The complaint alleges the Workable Program for Community Improvement submitted by the City is not in compliance with provisions of Federal law governing code enforcement, housing and relocation, planning and programming and citizen participation. Certification of the Workable Program was provisionally approved by HUD in May, but only for six months instead of the normal two-year approval. Further legal action is under consideration. HUD has retained jurisdiction and the City has scheduled public hearings on the Program.

2. *Los Angeles Community Service Organization v. County of Los Angeles.*—This is an administrative complaint filed with HUD, challenging the Workable Program filed by the County. It raises substantially similar issues to the complaint against the City. The County has not yet responded.

3. *Gold v. City of Los Angeles.*—Suit to enjoin the sale of Media Park to private persons. Media Park, located on Culver Boulevard adjacent to the city limits of Culver City, is located in a residential neighborhood substantially inhabited by elderly persons of limited means who use it regularly. Nearly forty years ago a portion of the park was acquired by the City for rights of way to Venice Boulevard. Realignment of the highway will now cause abandonment of that land and the City has decided the Park is "unsuitable" and has proposed that an equivalent plot of land be acquired and dedicated as a public park. The plaintiffs contend the Park is suitable and that the City is proposing to substitute a smaller park in violation of the Los Angeles Charter. Case awaiting trial.

4. *Appel v. City of Los Angeles.*—Suit to prevent the City and County of Los Angeles from imposition of substantial land assessments which would involve the widening and deepening of the Venice Canals, and related improvements. Plaintiffs are tenants, poor and elderly, who live in the affected area. The improvements, amounting to a $20.5 million assessment, would attract expensive high-rise apartments and drive out aged residents. Basis of the suit is that only property owners were permitted to appear at the hearing and that relocation provisions of state law have been ignored. Plaintiffs' motion for partial summary judgment was granted June 19, 1970 with respect to the rights of tenants to appear and vote at a hearing establishing the assessment district.

5. *Lumel v. Poladian.*—*Amicus curiae* brief filed to invalidate California's "baggage lien law." Enacted in 1876 to give innkeepers the right to detain a guest's baggage until he paid his bill, the law is now applied to urban apartment dwellers. The brief contends this application is an invasion of privacy and the taking of property without due process of law.

6. *Congress of Mexican-American Unity v. Yorty.*—Suit to enjoin further expenditures by HUD and the City of Los Angeles in the East-Northeast Model Cities area brought by 300 Mexican-American organizations and a group of elderly homeowners. Basis of suit is failure of the city to establish a citizens participation structure as required by Federal law. Defendants have not responded as yet.

CALIFORNIA RURAL LEGAL ASSISTANCE

1. *King v. Brian.*—Lawsuit to require the Director of the California Department of Health Care Services to adopt administrative regulations that will permit Medi-Cal (the State Medicaid program) beneficiaries to enroll as regular subscribers in prepayment health care plans. At present California disburses Medi-Cal moneys only on a fee-for-service arrangement. The suit alleges that the California legislature passed a law in 1969 requiring the Director to contract with prepayment organizations in behalf of Medi-Cal beneficiaries and adopt appropriate regulations. In its complaint, CRLA asserts that prepayment health care plans will enhance competition among various organizations to provide quality health care, substantially reduce the cost of health care, improve the quality of medical services rendered under Medi-Cal and substantially reduce the program's administrative costs. A hearing has been postponed pending a negotiated settlement.

2. *Wong v. Brian.*—This action seeks to enjoin the Director of the California Department of Health Care Services from adopting regulations that would eliminate 50,000 medically needy persons from Medi-Cal eligibility. The regulations, which would affect 200,000 persons not on welfare but eligible for certain health benefits, lower the monthly income level and reduce the amount of personal property that may be owned. The suit alleges the proposed changes conflict with Federal and State law and, if adopted, would force those persons excluded from Medi-Cal into becoming public assistance recipients. Hearing scheduled before August 1, 1970, the effective date of the regulation.

3. *Robertson v. Martin.*—Suit to enjoin the promulgation of emergency regulations that would reduce by 50 percent the State payment for attendants of persons who require personal home care services. Salaries would be reduced from $300 to $150 monthly. The effect of the regulations, calculated to save $10 million, would require the institutionalization of thousands of elderly persons in nursing home and county facilities. The State rescinded the regulations following a courthouse conference prior to the suit being filed.

APPENDIX C

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, SPONSORED BY THE NATIONAL COUNCIL OF SENIOR CITIZENS, FOR THE U.S. OFFICE OF ECONOMIC OPPORTUNITY

STAFF

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Nelson H. Cruikshank, President
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LEGAL RESEARCH AND SERVICES FOR THE ELDERLY
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David H. Marlin, Associate Director
Sara Jane Hardin, Assistant Director
Irene L. Gomberg, Executive Assistant
Enilda P. Angulo, Legal Secretary

CENTER FOR LEGAL PROBLEMS OF THE ELDERLY, CENTER ON SOCIAL WELFARE POLICY AND LAW,

401 West 117th Street,
New York, New York 10027.

Jonathan Weiss, *Project Director.*

Sponsored by Columbia University, this project is the main research and technical assistance resource for LRSE. It is currently assisting in the litigation of more than forty lawsuits designed to protect and expand the legal rights of senior citizens. The issues include commitment procedures, withholding of benefits and pensions, residency requirements as eligibility for public assistance, and the quality and availability of medical care. The Center has also prepared comments concerning health care, public utility rates for the elderly, Social Security, and public assistance. A booklet, "Your Right to Medicaid", has been published in English and is soon to be translated into Spanish. The project co-sponsored with the National Legal Program on Health Problems of the Poor a national conference in Chicago on health care issues.

SAN FRANCISCO LOCAL DEVELOPMENT CORPORATION,

2707 Folsom Street,
San Francisco, California 94110.

Simon Blattner, *Project Director.*

This economic development program in San Francisco concentrated its experience and expertise on assisting the elderly poor to become entrepreneurs. The major effort under the grant concerned the establishment of a wholesale meat business specializing in serving minority-owned grocery stores and restaurants. The work involved market research, operations and financial planning, the institution of an insurance policy to guarantee loan repayment, and the association of a partner.

COUNCIL OF ELDERS,

14 John Eliot Square,
Roxbury, Massachusetts 02119.

James Bergman, *Project Director.*

An incorporated organization of the aged residents of the Model Cities area of Boston, the Council of Elders has retained as counsel the private law firm of Mahoney, McGrath, Atwood, Piper and Goldings. The project drafted and submitted to the Massachusetts legislature eight proposed bills, ranging in issue from utility rate reductions to the appointment of public conservators. Last summer, at the request of Senator Moss of the Senate Special Committee on Aging, the project submitted a statement suggesting changes in Model Cities legislation and policy that would facilitate the establishment of similar councils elsewhere. The Council's other accomplishments include obtaining fare reductions for seniors on public transportation, securing police protection from the Boston Housing Authority in public housing projects, and testimony before numerous committees and commissions on the problems of the elderly.

HOUSING OPPORTUNITIES FOR THE WEST SIDE ELDERLY (HOWSE), WESTERN CENTER ON LAW AND POVERTY

309 Santa Monica Boulevard, Suite 403,
Santa Monica, California 90401.

Stanton J. Price, *Project Director.*

Operated by the Western Center on Law and Poverty, this project has specialized in housing problems of the elderly in the Los Angeles area. HOWSE was successful in persuading the Santa Monica City Council to participate in the leased housing program administered by the County of Los Angeles; an administrative complaint has been filed to deny certification by HUD of the Workable Program for Community Improvement submitted by the City of Los Angeles; a lawsuit was filed to prevent a canal assessment that virtually would have eliminated low-cost housing in Venice. HOWSE has also drafted housing legislation and provided assistance to groups active in the construction of federally assisted low-income housing.

RESEARCH AND SERVICES FOR THE ELDERLY

1015 Tijeras Avenue, NW.,
Albuquerque, New Mexico 87103.

Clarence Gailard, *Project Director.*

The purpose of this project sponsored by the Legal Aid Society of Albuquerque has been to furnish legal assistance to the elderly poor in the organization and development of cooperatives, buying clubs, small businesses, and employment opportunities; and to analyze and evaluate the difficulties and prospects of these goals. One of the main accomplishments has been the creation of the Senior Citizens Employment Service, the first of its kind in Albuquerque, with more than 500 elderly residents registered.

SMALL ESTATES ADMINISTRATION FOR THE BRONX AGING (SEABA)

960 Grand Concourse, Bronx, New York 10451.

Professor Edward McGonagle, *Director.*

Under the sponsorship of Fordham Law School and the direction of one of its professors, the project is designed to produce legislative recommendations to reform the administration of small estates so that property is transferred expeditiously and the estate is protected from unjust fees and costs, including the establishment of a minimum under which no charges would be made. The project has a community education office in the Bronx to inform the elderly of probate law and procedure, acquire community views and assist them in arranging their affairs. The project will examine and report on probate practices of all States, with special emphasis on New York.

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY

University P.O.B. 854,
Morehead State University,
Morehead, Kentucky 40351.

Michael Johnson, *Project Director.*

One of two LRSE programs in Appalachia, this project first conducted an intensive survey of elderly residents of Rowan County, Kentucky. The survey revealed that the lack of public transportation prevented senior citizens from applying for and receiving Federal and State benefits to which they were entitled. The local Community Action Agency agreed to furnish free bus service throughout the county two full days each week. The project also has assisted the elderly poor in receiving the benefits of a low-cost loan program to provide materials to enable them to participate in *Operation Mainstream:* it has presented testimony before the Senate Select Committee on Nutrition & Human Needs; and has participated in litigation to improve Federal benefits programs for the elderly. The project is sponsored by the Legal Services Program of the Northeast Kentucky Area Development Council.

LEGAL SERVICES SENIOR CITIZENS CENTER

Suite 309, Harvey Building,
1370 Washington Avenue,
Miami Beach, Florida 33139.

Leonard Helfand, *Senior Attorney.*

Operating in an area heavily populated by the elderly poor, the Miami Beach program has the support of a large community organization base. One of its most significant accomplishments has been the drafting and successful advocacy of a rent control ordinance. The project is currently engaged in litigation to uphold the validity of the ordinance. Other activities include assistance of groups attempting to construct low-cost housing for the elderly; the submission of a public guardianship statute now pending before the state legislature; improvements enacted to the city's Minimum Housing Code; and several law suits, including a challenge to the residency requirements for eligibility to receive old age assistance. This project is sponsored by the Economic Opportunity Legal Services Program in Miami.

LEGISLATIVE RESEARCH CENTER, UNIVERSITY OF MICHIGAN LAW SCHOOL

Ann Arbor, Michigan 48104.

Professor William J. Pierce, *Director.*

This is a newly-funded 10-week program of research and legislative drafting conducted by the Law School. The project is drafting model statutes, which can be tailored to local requirements, with explanatory materials, and legal memoranda which can be converted to state statutes by state legislative drafting services. The issues include housing, Federal benefits, conservatorship and guardianship, and agencies concerned exclusively with the elderly.

LEGAL RESEARCH FOR APPALACHIAN ELDERLY

308 Coal and Coke Building,
Bluefield, West Virginia 24701.

James Haviland, *Project Director.*

Sponsored by the Mercer County Economic Opportunity Corporation, this project, located in a coal-mining district of Appalachia, has concentrated on Social Security disability benefits and effective regulations governing determination of eligibility under the Federal Coal Mine Health & Safety Act of 1969. The West Virginia project, additionally, has submitted comments on proposed hearing and appeals procedures for the State Department of Welfare; begun production of a series of community education booklets (which will include illustrated discussions of the usefulness of lawyers, Social Security, health care, pension rights, and consumer and housing problems); litigated numerous cases involving claims for disability insurance benefits and miners pension benefits; and begun investigation into nursing home care.

SENIOR CITIZENS PROJECT,
CALIFORNIA RURAL LEGAL ASSISTANCE

942 Market Street, Room 606,
San Francisco, California 94102.

Fred J. Hiestand, *Counsel.*

The only LRSE project exclusively concerned with health care and facilities, CRLA has a three-fold focus: litigation, legislation and training elderly community residents to work on behalf of the poor with various health agencies and institutions. The project has sued to require the State of California to authorize Medicaid contracts with pre-paid health insurance plans and to prevent announced reductions in the Medi-Cal program. CRLA has developed an intensive three-month lay advocacy training program which has been completed by its seven aides. The aides have been subsequently placed for employment with social welfare agencies in the San Francisco area. A training manual, based upon the project's experience, has been developed for use by other programs.

GOLDEN AGE LEGAL AID

1070 Washington Street,
Atlanta, Georgia 30315.

Sidney L. Moore, Jr., *Project Director.*

The Atlanta Legal Aid Society, sponsor of Golden Age Legal Aid, has developed a broad program of law reform for adoption by the city council and the state legislature. Proposals range from lower transportation rates at non-rush hours, to revision of the city's housing code, to improvements in the substance and administration of government programs that benefit the elderly. GALA has created successful cooperative grocery stores in several public housing projects and has assisted the organization of several economic development projects.

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