LITIGATION STRATEGIES FOR ADDRESSING BUREAUCRATIC DISENTITLEMENT

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Introduction 591
I. Entitlements and Bureaucratic Disentitlement 592
II. An Example: The Los Angeles County General Relief Program. 594
III. Litigation Strategies and Tactics 597
A. Institutional or Structural Reform Litigation 597
B. Targeted, Sequential, Systemic Litigation 598
IV. The Limits of Targeted Litigation and Alternatives 599
V. Systemic Approaches to Structural Litigation 600
A Concluding Note on Remedies 602

> Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
>
> *Universal Declaration of Human Rights*[1]

INTRODUCTION

> "A fella got to eat," he began; and then belligerently, "A fella got a right to eat." "What fella?" Ma asked.
>
> *J. Steinbeck, The Grapes of Wrath*[2]

The notion that people should not be allowed to freeze to death or starve runs deep in our culture. These principles also find expression in the statutory or constitutional law of most American states[3] and underlie the complex regulations of dozens of welfare and related programs. Despite these laws, however, millions of Americans are homeless and hungry.[4] For them, the

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1. Art. 25(1), U.N. Doc. A/810, U.N. Sales No. 1952.1.15 (1948).

2. J. STEINBECK, THE GRAPES OF WRATH 414 (1939), *quoted in* Bensinger, *From Public Charity to Social Justice: The Role of the Court in California's General Relief Program*, 21 LOY. L.A.L. REV.497, 497 (1988).

3. *See* Langdon & Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 362-92 app. (1985).

4. *See, e.g.*, UNITED STATES CONFERENCE OF MAYORS, THE CONTINUING GROWTH OF HUNGER, HOMELESSNESS AND POVERTY IN AMERICA'S CITIES: 1987 (1987).

Declaration of Human Rights[5] has a distant and empty ring. It is not unusual, of course, for abstract expressions of values — even when codified into law — to stand in stark contrast to reality. In the abstract, black children have a right to an equal quality of education, poor tenants have a right to procedural due process of law when threatened with eviction, and prisoners have a right to freedom from degradation and abuse. It is in the chasm between ideal expressions of rights and the reality of social deprivation that some lawyers are called upon to work. Their task is to convert the aspirational into the real, to extract an answer to the question, "What fella" has a right to eat?[6]

I.
ENTITLEMENTS AND BUREAUCRATIC DISENTITLEMENT

There remain, in both statutory and decisional law, many artifacts of the social and political reforms of the 1930s and 1960s which have not, as yet, been uprooted and destroyed by the "conservative" trend of the 1980s. Eligible poor people have particularized rights to the means of subsistence guaranteed in principle by statutory law and administrative regulation in programs such as the Supplemental Security Income (SSI)[7] and Aid to Families with Dependent Children (AFDC).[8] In many states, even those individuals viewed as less "worthy" — particularly the able-bodied but unemployed — have the abstract right to bare subsistence by virtue of statute or state constitution. In California, for example, a general statute requiring counties to "relieve and support" the indigent has been construed as an enforceable mandate to provide at least the bare essentials of food, shelter, clothing, medical care, and transportation.[9] A provision of the New York Constitution which declares that aid, care, and support of the needy shall be provided by the state has been similarly construed as mandatory.[10] Statutes or state constitutions provide some form of subsistence program in virtually every state.[11]

Such statutory rights, however, cannot be eaten or worn, nor do they provide shelter from the cold. The reality of such rights exists not in law journals, but in welfare office waiting rooms and on the streets. The contradiction between the precatory or even mandatory language of welfare statutes and the reality encountered by the poor has perhaps never been more troubling than it is at the present time. Though in the Reagan era the American

5. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 1.

6. J. STEINBECK, *supra* note 1, at 414.

7. 42 U.S.C. §§ 1381-1383c (1982 & Supp. IV 1986).

8. Social Security Act, ch. 531, §§ 401-406, 49 Stat. 620, 627-29 (1935) (current version at 42 U.S.C. §§ 601-662 (1982 & Supp. IV 1986)).

9. CAL. WELF. & INST. CODE § 17000 (West 1980), *construed in* Boehm v. Superior Court of Merced County, 178 Cal. App. 3d 494, 223 Cal. Rptr. 716 (1986). *See generally* Bensinger, *supra* note 6.

10. N.Y. CONST. art. XVII, § 1, *construed in* Tucker v. Toia, 43 N.Y.2d 1 (1977). But in New York, the determination of who is classified as needy and the amount of aid to be provided are subject to very wide legislative discretion. *See* Bernstein v. Toia, 43 N.Y.2d 437 (1977).

11. *See* Langdon & Kass, *supra* note 3.

right wing was largely unsuccessful in completely eliminating social programs, the budgets for such programs were severely slashed in relation to need, and bureaucrats were given instructions to comply with budgetary limits. Budget reductions were accomplished in part by straightforward and open restrictions on eligibility, for example, by restricting the classes of eligible recipients or by limiting benefits to particular periods of time.[12]

But entirely apart from the changes accomplished in the open through normal legislative and administrative channels, a much more insidious form of retrenchment has occurred: bureaucratic disentitlement. In his seminal article, Michael Lipsky described the phenomenon as follows:

> In bureaucratic disentitlement, obligations to social welfare beneficiaries are reduced and circumscribed through largely obscure "bureaucratic" actions and inactions of public authorities. . . . Bureaucratic disentitlement takes place in the hidden recesses of routine or obscure decision making, or the unobtrusive nondecisions of policymakers. Therefore, it tends to allocate entitlement without the accountability that normally restrains government excesses or allows full discussion of critical distributive issues.[13]

Thus, although conservative political forces might be unable openly to reduce aid to poor children, precisely the same results can be accomplished by what appear to be neutral operations within the administering bureaucracy. Many of these neutral operations are conducted under the guise of "quality control."[14] As a result, the contradiction between statutory mandate and bureaucratic disincentives is not faced directly but submerged in the recesses of large agencies — hidden from public view and judicial scrutiny.

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12. *See, e.g.*, Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2301-2321, 95 Stat. 357, 843-60 (amending the Social Security Act, 42 U.S.C. §§ 601-610 (1976)) (codified at 42 U.S.C. §§ 601-610, 612, 614, 615, 645 (Supp. IV 1986)).

13. Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984).

14. In the business world, "quality control" refers to measures intended to ensure that products and services meet specified standards. In the dispensation of public benefits, quality control refers to the use of monitoring and sampling techniques to ensure that benefits are delivered in conformity with regulations and policies. The effects of quality control are determined in large part by what is defined as an error for quality control purposes. If, for example, quality control monitors look only for instances of overpayment of benefits and ignore underpayments, the monitored workers may concentrate exclusively on ensuring that recipients get nothing to which they are not entitled—while being much less attentive to avoiding errors which harm recipients. *See, e.g.*, Brodkin & Lipsky, *Quality Control in AFDC as an Administrative Strategy*, 57 SOC. SERV. REV. 1 (1983). Brodkin and Lipsky contend that state management reforms implemented under the rubric of quality control may negatively affect welfare programming by creating an exclusionary system, rather than focusing on the inclusion of needy individuals. This emphasis on restricting payments to those not entitled increases the probability of errors in benefit determinations. *Id.* at 3, 30.

II.
AN EXAMPLE: THE LOS ANGELES COUNTY GENERAL RELIEF PROGRAM

Bureaucratic disentitlement is best understood by way of a concrete example: in this case, from the General Relief program in Los Angeles County, California.[15] General Relief is similar to general assistance programs in states across the country. It is the last and lowest level of the "social safety net," the one program to which people ineligible for any other form of assistance are, in theory, eligible.[16] In any month, nearly ten thousand people apply for aid, of whom about two-thirds are not only destitute but homeless as well.[17] Pending action on their applications, homeless applicants are provided with vouchers which can be exchanged for lodging in one of dozens of hotels and motels with which the County has made arrangements.[18] Those who successfully complete the application process receive a stipend of $312 per month, which is intended to cover all their needs. In exchange, recipients who are able must work at County work projects.[19] On paper, General Relief is the program which one expects would provide for the subsistence needs of the very poor. But reality belies theory. For example, despite the availability of lodging vouchers through this program, Los Angeles County has perhaps the largest number of homeless people of any American city.[20]

This contradiction cannot be understood merely by looking at the statute which mandates the existence of the General Relief program or the eligibility regulations by which it is implemented. In 1983, public interest advocates interviewed dozens of homeless applicants for General Relief in welfare office waiting rooms. The interviewers learned that hundreds of homeless people were being denied assistance because they lacked documentary identification, such as a birth certificate or a driver's license.[21] Interviews with welfare workers revealed that the stringency of the documentary identification requirement

15. CAL. WELF. & INST. CODE §§ 17000-17410 (West 1980 & Supp. 1989). LOS ANGELES COUNTY, CAL., CODE, ch. 2.102 (1982).

16. As the California Supreme Court said in Mooney v. Pickett, 4 Cal. 3d 669, 681 (1971): "General Assistance . . . remains the residual fund by which indigents who cannot qualify for and under any specialized aid programs can still obtain the means of life."

17. LOS ANGELES COUNTY DEP'T OF PUBLIC SOCIAL SERVICES, CHARACTERISTICS OF GENERAL RELIEF CLIENTS 40, 99 (1987).

18. LOS ANGELES COUNTY DEP'T OF PUBLIC SOCIAL SERVICES, GENERAL RELIEF MANUAL OF REGULATIONS § 44-221.

19. LOS ANGELES COUNTY, CAL., CODE § 2.102.120 (1982).

20. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, A REPORT TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS (1984), estimates that Los Angeles has more homeless persons than any American city (a total of between 31,800 and 33,800). The study has been widely criticized as *underestimating* the number of homeless people. *See, e.g.*, Applebaum, *Testimony on A Report to the Secretary on the Homeless and Emergency Shelters* in J. ERICKSON & C. WILHELM, HOUSING THE HOMELESS 156 (1986).

21. Affidavits of seventy-six homeless individuals deprived of assistance for lack of documentary identification were filed in support of a motion for a preliminary injunction in Eisenheim v. Board of Supervisors, No. C479453 (L.A. County Super. Ct.) (Exhibits A-1 through A-45 and G-1 through G-31).

varied with the demand for services and was used to control the programs costs by limiting the flow of homeless persons into General Relief.[22] When a temporary restraining order prevented the welfare bureaucracy from interposing the documentary identification requirement, the hundreds of vacancies in the voucher hotel system were filled in a matter of days.[23] If a benevolent, or even a neutral bureaucracy, administered the General Relief program, the temporary restraining order would have lowered the barriers standing between homeless indigents and emergency shelter. Subsequent litigation, however, has revealed that the identification requirement was only one weapon in an extensive arsenal available to an efficient bureaucracy following orders from an extremely conservative political body, the Los Angeles County Board of Supervisors.[24]

Joel Handler has described in detail elsewhere the experiences of one homeless and developmentally disabled client who attempted to obtain emergency shelter from the General Relief program.[25] Even with an experienced advocate who spent more than one hundred hours helping him negotiate a bizarre maze of paperwork and procedures, the applicant was repeatedly denied the assistance to which the program's regulations plainly entitled him.[26] What happened to this individual is not atypical of the difficulties faced by homeless persons seeking help from General Relief,[27] nor are these difficulties the inexorable consequence of the operations of a large bureaucracy. Rather, they are the product of careful strategic planning on the part of the managers

22. *See* Blasi, *Litigation on Behalf of the Homeless: Systematic Approaches*, 31 J. URB. & CONTEMP. L. 137, 138-39 (1987).

23. A telephone survey conducted on December 12, 1983, found 206 vacancies in hotels which accepted County vouchers. Affidavit of Charles F. Elsesser, Jr., Esq., Legal Aid Foundation of Los Angeles, submitted December 20, 1983, in *Eisenheim*, No. C47953, L.A. County Super. Ct. A temporary restraining order was issued on December 20, 1983, by the Los Angeles County Superior Court, Leon Savitch, Judge presiding, which order restrained the County from "imposing documentary identification requirements on homeless applicants for General Relief in need of immediate, temporary, emergency shelter in a manner as to withhold temporary shelter to otherwise eligible persons pending documentary verification of identity." Order, p. 3. The telephone survey was repeated during the first week of January 1984. Fewer than twelve vacancies were then reported. (author's personal knowledge).

24. More recent "weapons" have included the development of a computerized Centralized Termination/Denial system through which General Relief recipients are terminated without human intervention. At the same time that a notice of termination is mailed to the recipient, the computer transmits an advisory notice to the affected welfare worker, who can intervene to stop an inappropriate termination at her discretion. The County estimated that this innovation would reduce benefit payments by nearly $10 million although between seventy-five and eighty percent of those terminated would be "recidivists," i.e., persons who would come back into the system as applicants as soon as they were terminated. DPSS Administrative Directive 3051, Deposition of Clayton Hertz, Assistant Program Deputy, General Relief Planning Section, Los Angeles County Dep't of Public Social Services, April 27-28, 1989, in City of Los Angeles, et al. vs. County of Los Angeles, et al., No. C655274, L.A. County Super. Ct.

25. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in an Historical Perspective*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 529-33 (1987-88).

26. *Id.* at 529.

27. *See, e.g., supra* note 21.

of the General Relief system. A high-ranking welfare bureaucrat made the underlying strategy quite clear when he publicly admitted that "the welfare application process . . . was designed to be rough. It is designed quite frankly to be exclusionary."[28]

The case Professor Handler describes resulted in a lawsuit, *Rensch v. Board of Supervisors*,[29] in which the trial court ordered Los Angeles County to implement yet another set of program regulations which attempt to identify mentally disabled persons and provide special assistance to them.[30] At each welfare office where large numbers of people apply for General Relief, "mental health workers" are purportedly regularly assigned and empowered to designate disabled applicants as needing special assistance.[31] Unfortunately, however, these mental health workers see only a tiny fraction of the mentally disabled applicants partly because they are permitted to see only those applicants referred to them by clerks whose mental health training consists of a single, four-hour lecture.[32]

From 1983 to the present, no general assistance program in the country has been the subject of such intense litigation as the Los Angeles County General Relief program. A team of attorneys from six public interest law firms and several private law firms has litigated six lawsuits aimed at removing one or more obstacles placed in the path of indigent homeless people seeking help from the General Relief program.[33] The number of homeless persons receiv-

28. Address by Robert Chaffee, Director of Bureau of Assistance Payments, Los Angeles County Dep't of Public Social Services, to Los Angeles Countywide Coalition on the Homeless (Oct. 9, 1984).

29. No. C595155, slip op. (L.A. County Super. Ct. Aug. 6, 1986).

30. Los Angeles County Dep't of Public Social Services, Administrative Directive 2770, Oct. 30, 1986.

31. *Id.*

32. *See, e.g.*, Deposition of Henry Brown, Information Worker, Los Angeles County Dep't of Public Social Services, in *Rensch*, No. C595155, slip op. (L.A. County Super. Ct. Aug. 6, 1986).

33. Eisenheim v. Board of Supervisors, No. C479453, L.A. County Super. Ct. (documentary identification requirements and quota system for homeless applicants; temporary restraining order; permanent injunction by stipulation); Ross v. Board of Supervisors, No. C561603, L.A. County Super. Ct. (inadequacy of amount of cash provided for emergency shelter; preliminary injunction issued; case pending); Paris v. Board of Supervisors, No. C523361, L.A. County Super. Ct. (illegal slum conditions in voucher hotels to which homeless were sent; temporary restraining order and preliminary injunctions by stipulation; case pending); Bannister v. Board of Supervisors, No. C525633, L.A. County Super. Ct. (imposition of sixty-day disqualification period for violation of workfare rules; procedures altered with preliminary injunction pending; case pending); Blair v. Board of Supervisors, No. C568184, L.A. County Super. Ct. (inadequate General Relief amount; stipulated injunction raising grant by thirty-seven per cent over two years); Rensch v. Board of Supervisors, No. C595155, slip op. (L.A. County Super. Ct. Aug. 6, 1986) (procedures altered pursuant to court-ordered plan; case pending). The public interest law firms are: Legal Aid Foundation of Los Angeles, Western Center on Law and Poverty, ACLU Foundation of Southern California, Inner City Law Center, Mental Health Advocacy Services, Center for Law in the Public Interest, San Fernando Valley Neighborhood Legal Services, and Protection and Advocacy, Inc. The most notable private law firm is the business litigation firm of Irell & Manella which contributed more than five thousand pro bono hours to one case challenging the horrid conditions in the hotels to which the home-

ing emergency shelter has increased dramatically since the first lawsuit was filed.[34] Yet tens of thousands of indigent people, all of them eligible on paper for General Relief benefits, continue to occupy Los Angeles' sidewalks, alleys, parks, abandoned cars, and all-night theatres.[35] This phenomenon is in part the consequence of worsening economic and other conditions for the very poor of Los Angeles, but it is also the product of conscious decisions[36] on the part of a hostile bureaucracy. Such a situation presents very difficult questions of strategy and tactics for litigators.

III.
LITIGATION STRATEGIES AND TACTICS

In 1983, the team of Los Angeles attorneys[37] contemplated the filing of a single, comprehensive lawsuit against the County of Los Angeles, seeking either wholesale changes in the General Relief system or an order that the County provide the homeless with shelter directly. Such a case would have fallen squarely within a tradition of institutional reform litigation seeking systemic change in complex institutions — prisons, school systems, mental institutions, and welfare bureaucracies.

A. Institutional or Structural Reform Litigation

In the 1970s, litigation seeking structural reform seemed to offer much promise to advocates for the poor and powerless. In his well-known 1976 article, Abram Chayes commented on what he called "public law litigation."[38] Within this public law litigation model, the judiciary is drawn into the enforcement of general and seemingly abstract rights in very particularized

less were sent. *See* Clancy, *Lawyers Team Up to Fight for the Homeless*, L.A. Times, Sept. 18, 1986, § V, at 1.

34. LOS ANGELES COUNTY DEP'T OF PUBLIC SOCIAL SERVICES, GENERAL RELIEF HOMELESS APPLICANTS REPORT, a monthly compilation of statistics, reports that between January 1984 and December 1988, the number of homeless applicants assisted increased from 1954 per month to 5603 per month.

35. Both the City of Los Angeles and Los Angeles County submit a Comprehensive Homeless Assistance Plan to the federal government in order to obtain funds under the federal McKinney Act. Both plans include a lengthy exposition of the problems of homelessness in the Los Angeles area, including estimates of up to fifty thousand homeless persons in the area.

36. For example, within months after the amount of assistance provided under the program was raised (on the eve of a trial), the County implemented several new programs specifically targeted at trimming the General Relief rolls. The new programs included a monthly recertification process requiring the monthly submission of a form to continue eligibility; the creation of a computerized tracking system entitled GREAT, the purpose of which was to ensure that recipients would be terminated within one day of any missed appointment or the failure to submit a required form; and a new Intake Pilot, under the terms of which a homeless applicant was required to complete a much greater number of tasks during the first seven days after applying for General Relief, including four days of a work project, and five face-to-face attempts to locate a job.

37. *See supra* note 34 and accompanying text.

38. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

ways.[39] Decrees in these cases require changes in complex institutions.[40] Through these institutional reform cases, judges have become involved in very intrusive ways in the operation of other governmental entities, not only by issuing injunctions, but also by appointing special masters, experts, panels, advisory committees, even receivers, making the judiciary a very significant part of what had long been the province of purely political actors and their surrogates in the bureaucracies.[41]

Institutional litigation, however, provoked a powerful reaction. Images of an "imperial judiciary,"[42] which is said to be both undemocratic and incompetent,[43] have been used to attack the efforts of welfare advocates to achieve even minimal reform, nor has the reaction been confined to conservative academic circles.[44] Just as the Burger Court shattered the hopes of some for the creation of new rights to subsistence or housing, so did the judiciary shatter the hopes of those who expected it to enforce actively the other rights of the poor.[45]

B. Targeted, Sequential, Systemic Litigation

Against this backdrop, the Los Angeles litigation team believed that it would be extremely difficult to persuade a state court judge to intervene dramatically in the operations of Los Angeles County's welfare program. Simply put, the team calculated that a full-scale legal assault on a broad front would probably fail. Instead, to continue the military analogy, the team chose a litigation strategy more similar to guerilla warfare.

Between 1983 and 1987, the litigation team filed a series of separate, albeit closely related and carefully targeted, lawsuits[46] aimed at removing the most fundamental barriers placed in the path of homeless people seeking aid from the County. In each of those cases, the plaintiffs were successful, to some degree, in obtaining the narrow relief sought largely because of the strategy adopted.

The adopted strategy had several advantages over the paradigmatic institutional reform case. First, the plaintiffs did not ask a state court judge to

39. *Id.* at 1298-1302.

40. *Id.* at 1294.

41. The paradigmatic example is Judge Johnson's intervention in an atrocious system of institutions for the retarded in Alabama. *See* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp 373 (M.D. Ala 1972); 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, and remanded by* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

42. Glazer, *Towards an Imperial Judiciary?*, PUBLIC INTEREST, Fall 1975, at 104.

43. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

44. Only six years after his landmark article, Professor Chayes surveyed the damage done by the Burger Court to the foundations of public law litigation and found a scene of wreckage, if not desolation. Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

45. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Lindsey v. Normet, 405 U.S. 56 (1972).

46. *See supra* note 34.

intervene directly and dramatically in the operations of a complex bureaucracy or in the decisions of political decision makers. Instead, the plaintiffs asked the court to halt only particularly egregious practices.[47] Such a request is much more in keeping with the experience of most state court judges, who are seldom asked to undertake the massive institutional reform cases which have been filed in federal court and which are increasingly rare even in that jurisdiction.

Second, the narrow focus of the lawsuits made it much more likely that the plaintiffs could obtain significant relief at a very early stage in the litigation, by temporary restraining order or preliminary injunction. In each case, motions for preliminary injunctions seeking some or all of the relief requested in each case were filed along with the complaint.

Third, by drawing the boundaries of the lawsuit narrowly, plaintiffs' counsel were able to concentrate a significant part of their limited resources on fairly narrow issues of fact. For example, when the County moved to vacate the injunction prohibiting it from requiring documentary identification on the ground that the injunction was permitting welfare fraud to occur, plaintiffs' counsel were able to present an eminent authority on security measures to contest the county's contentions.[48] Similarly, they were able to collect dozens of affidavits that focused narrowly on the harm which would result if the injunction were lifted. Plaintiffs' counsel simply would not have had the resources to obtain evidence across a significantly wider factual front.

In sum, it is easier to control, litigate, and obtain relief in more narrowly focused litigation. The question remains, however, whether even successful, but narrowly targeted, litigation can achieve significant institutional reform.

IV.
THE LIMITS OF TARGETED LITIGATION AND ALTERNATIVES

As previously suggested,[49] administrative agencies under the instruction of conservative political forces have a very considerable opportunity to make up for legal setbacks through various stratagems of bureaucratic disentitlement. Simply put, bureaucrats can break systems faster than judges can fix them. Must advocates of welfare rights then return to the institutional reform litigation which has fallen on such hard times both in the federal courts and in

47. For example, the court ordered that homeless people not be denied emergency shelter only because they lacked possession of a birth certificate, Eisenheim v. Board of Supervisors, No. C479453, L.A. County Super. Ct., and that homeless people be provided with actual shelter or funds necessary to obtain it, rather than checks in a sum ($8.00) insufficient to obtain shelter anywhere in the County, Ross v. Board of Supervisors, No. C561603, L.A. County Super. Ct. (pending).

48. *See* Affidavit of Dr. Glen LaPalma, a specialist in fraud countermeasures, who was also a former Postal Inspector and security expert for Blue Cross of California. Eisenheim v. Bd. of Supervisors, No. C479453, L.A. County Super. Ct.

49. *See supra* text accompanying notes 26-33.

legal academic discourse? I suggest that this question cannot be answered in the abstract and that a third approach may exist.

A legal strategy cannot ignore local legal precedent or local political considerations, particularly those which affect judges. In jurisdictions where the target bureaucracies are not fundamentally hostile as the result of local political conditions, but where judges are nevertheless reluctant to grant sweeping, intrusive relief in large institutional reform cases, sequential and narrowly targeted litigation may still be very effective, in part because of the consequent public attention and political embarrassment. Where the environment is less hospitable, and where it appears necessary to attempt larger and more comprehensive litigation in order to achieve any meaningful relief, litigating a series of narrower cases may be a very useful prelude. Welfare rights advocates gain a great deal of essential factual information about the way the system is harming clients by litigating narrower cases. This information may eventually be used to structure more comprehensive litigation. In the homelessness cases in Los Angeles, for example, the litigation team has accumulated tens of thousands of pages of documents and more than one hundred depositions of county officials, all of which have been very useful in understanding the system as a whole, which is a necessary predicate to effective systemic litigation.

When confronted with a hostile and creative bureaucracy, however, virtually all of the victories won in sequential, targeted litigation may be vitiated by new stratagems of bureaucratic disentitlement. The only hope of effecting significant and relatively permanent institutional change may be to place the entire system before one judge at one time to be tested, as a whole, against abstract legal standards. The question then becomes whether and how welfare rights advocates can win such litigation and enforce its remedies. Litigators have faced these issues since the first school desegregation cases of the 1950s, and in some respects, there may be no new answers. There may, however, be some new approaches to solving old problems, just as there are some new obstacles to overcome.

V.
SYSTEMIC APPROACHES TO STRUCTURAL LITIGATION

Over the past two decades, there have been several changes in the way administrative agencies are run, and consequently, in the way they must be understood. The computer revolution has made it possible for managers of bureaucracies to collect and utilize operational information in a much more systematic way. Virtually every large bureaucracy now has in place some form of computerized information system by which to assess and control performance and costs. The same information used to measure the effects of planned bureaucratic disentitlement can be utilized by poverty rights advocates to show its existence. By using the information base developed by the institutional defendants themselves, it is now possible to paint a much more

accurate and comprehensive picture of how a school district or even a welfare system functions.

As the nature and volume of potential evidence has expanded, so too have the methods of making comprehensible otherwise bewildering and complex situations. In addition to the theoretical analyses of complex organizations found in sociology, there are now at least two distinct professional disciplines with the expertise to analyze, distill, and present an accurate and credible assessment of very complex bureaucratic phenomena. The first of these disciplines is evaluation research, a particular species of applied social research which attempts to estimate the impacts and effects of social programs.[50] Evaluation research grew out of the need of political decision makers to assess the effectiveness of social programs. The tools of evaluation research are primarily those of the academic sociologist: surveys, structured interviews, and quantitative methods of many kinds. In the past, evaluation research techniques were utilized to help policy makers select among varieties of social programs. The techniques sometimes included very expensive, large-scale experiments designed to measure the consequences of particular forms of housing assistance.[51] Some of these studies were conducted by academic specialists in applied social research, but most were the product of think tanks similar to the Rand Corporation and Abt Associates.[52]

The other methodology comes not from academic social research but from the domain of business and management. In the business world, the traditional role of the outside accounting firm or accountant was, and generally remains, the conduct of financial audits to ensure that investors can rely on claims of financial performance of publicly held corporations. In the past two decades, a new dimension has been added to the financial auditing function traditionally performed by accounting firms, that of management auditing and management consulting. Virtually all of the Big Eight accounting firms have departments whose staff is capable of conducting reviews which go beyond purely financial aspects of business organizations. Businesses use these specialists to conduct efficiency studies, to identify organizational problems which impede productivity, and to examine in general the non-financial aspects of business management. The tools and techniques utilized come from a wide range of intellectual traditions but tend to rely more heavily on operations research and organizational analysis than on survey techniques.

In the public sector, these techniques came to be applied in what is now generally called "performance auditing."[53] While financial auditing may be

50. The standard textbook on the topic is P. ROSSI & H. FREEMAN, EVALUATION: A SYSTEMATIC APPROACH (3d ed. 1982). There are also journals devoted to evaluation research, such as EVALUATION Q. and EVALUATION PROGRAM PLANNING.

51. *See, e.g.*, THE GREAT HOUSING EXPERIMENT (J. Friedman & D. Weinberg eds. 1983).

52. A good review of the social history of applied social research is found in Rossi & Wright, *Evaluation Research: An Assessment*, 10 ANN. REV. SOC. 331 (1984).

53. *See generally* R. BROWN, T. GALLAGHER & M. WILLIAMS, AUDITING PERFORMANCE IN GOVERNMENT: CONCEPTS AND CASES (1982).

sufficient to assess business operations which have a definite economic "bottom line" measurable in dollars, there is no equivalent, unidimensional measure of the success or failure of governmental operations. Nevertheless, decision makers demand a degree of objective assessment of particular governmental operations or programs.[54] Government bureaucracies, moreover, seek help in increasing efficiency, even though the product of the bureaucracy is not measurable in dollars. The experience and intellectual resources for conducting performance reviews lie primarily in the management consulting divisions of the major accounting firms and in several smaller and more specialized firms which conduct such studies for organizations in both the public and private sector.

These new disciplines of evaluation research and performance auditing provide a benefit to the litigator. They allow a complex system to be made comprehensible to a judge or a jury. What would otherwise be a massive collection of unrelated information can begin to be understood as a whole. Merely impressionistic opinions can be replaced by verifiable assertions of fact. This is not to say, however, that the trial of an institutional reform case should come to resemble a doctoral dissertation in operations research or applied social research. But careful statistical analysis and expert testimony can create a framework in which to place more compelling testimony. For example, without such a framework, testimony about the failure of a welfare worker to consider the special needs of a mentally retarded applicant might be attributed to arguably irredressable factors such as bureaucratic insensitivity or presumably inevitable organizational sluggishness. Organizational analysis can demonstrate that the unacceptable behavior of welfare workers is predictable even if it is not the result of evil intention. Such evidence can make what might otherwise be characterized (by opponents) as a collection of unrepresentative horror stories both understandable and compelling as a unified portrait of bureaucratic misconduct.

A Concluding Note on Remedies

Neither evaluation research nor performance auditing necessarily solves the problems of fashioning remedies in institutional reform cases. Many people have argued that the courts are not capable of developing effective remedies for the complex methods of disentitlement discussed here, and therefore, institutional reform litigation is essentially futile. As a matter of decisional law, however, the courts have the necessary remedial tools, ranging in intrusiveness from "remedial abstention" to the appointment of a receiver. The

54. The paradigmatic examples are the studies conducted by the United States General Accounting Office (GAO). *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE STANDARDS FOR AUDITING OF GOVERNMENTAL ORGANIZATIONS, PROGRAMS, ACTIVITIES AND FUNCTIONS (1972) (Although the document was originally released in 1972, it was updated in 1981 at which time the GAO announced its intention to keep the standards up to date through periodic releases.).

difficulty lies in persuading the judiciary to exercise its undisputed equitable powers in ways which are coherent, systematic, and effective.

The development of the intellectual methods for understanding and measuring complex organizations — such as prisons, school systems, mental institutions, and welfare bureaucracies — at least increases the likelihood of doing so. A detailed understanding of how abstract rights are systematically denied in practice is probably the predicate both to a court's decision to intervene and to an ability to estimate the effects of the intervention. The existence, moreover, of reasonably detailed factual models of bureaucracies makes it easier for both litigators and courts to determine whether and how defendants are evading orders so that further relief can be limited, targeted, and effective. This is not to say that effective judicial intervention is assured, only that it is possible.