# LIFTING BURDENS: PROOF, SOCIAL JUSTICE, AND PUBLIC ASSISTANCE ADMINISTRATIVE HEARINGS

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## INTRODUCTION

For low-income public assistance recipients and applicants, the consequences can be literally fatal when the state cuts, terminates, or denies welfare benefits. While death may be an uncommon outcome, low-income families frequently face hunger, homelessness, disability, or lack of medical care[1] following the loss of critical benefits like Medicaid,[2] Temporary Assistance for Needy Families ("TANF"),[3] Supplemental Security Income ("SSI"),[4] and Food Stamps.[5] Children living in poverty can be adversely impacted for life when their families lose such benefits. Statistics show that family poverty disproportionately results in lower school performance[6] and an

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1. *See infra* Part I.A. *See also* Vicki Lens, *Work Sanctions Under Welfare Reform: Are They Helping Women Achieve Self-Sufficiency?*, 13 DUKE J. GENDER L. & POL'Y 255, 263–64 (2006) [hereinafter Lens, *Work Sanctions*] ("[Under TANF, s]anctioned families are at an increased risk of hunger and food insecurity. Housing conditions can deteriorate, as sanctioned families run an increased risk of homelessness, eviction, and utility shut-offs. Medical needs can go unmet. Children are particularly vulnerable. One study found that young children in sanctioned families were at an increased risk for food insecurity and hospitalizations as compared to children in nonsanctioned families. Since sanctioned families are cut off from their only means of support, they must seek alternative and often less stable means to survive. While some sanctioned families find employment, sell possessions, and turn to family members for support, one study found that sanctioning is also associated with illegal activities, such as begging and stealing.").

2. 42 U.S.C. §§ 1396–1396v (2000).

3. 42 U.S.C. §§ 601–617 (2000).

4. 42 U.S.C. §§ 1381–1383 (2000).

5. 7 U.S.C. §§ 2011–2036 (2000).

6. LISA G. KLEIN & JANE KNITZER, PROMOTING EFFECTIVE EARLY LEARNING: WHAT EVERY POLICYMAKER AND EDUCATOR SHOULD KNOW (Jan. 2007), *available at* http://www.nccp.org/publications/pub_695.html.

increased likelihood of mental illness for children.[7]

When a state or federal agency acts to deny or limit the safety-net welfare benefits of one of its vulnerable clients, that client can challenge the action in an administrative agency hearing.[8] In the hearing process, welfare clients can present their case for benefits to an Administrative Law Judge ("ALJ") or hearing officer who will determine whether the agency was correct in taking away or altogether denying the assistance.

I contend that the current administrative hearing structure is the primary social justice system for poor people in the United States and that this system is fundamentally unfair to the low-income appellants who seek justice there. For the resolution of disputes regarding access to food, shelter, clothing, and health care, low-income clients do not use the system in place for wealthier people in our country—the state and federal judiciary. Rather, the only real civil justice system available and accessible to the poor is the administrative hearing process in the executive branch of government. Administrative hearings in state and federal agencies that administer social welfare programs determine who gets and who keeps public assistance benefits that are critical to the health and welfare of poor families. There is little recourse when these benefits are denied by the hearings officer. These executive branch courts decide thousands of cases yearly, yet they are rarely scrutinized by the legal community to determine if their decisions are fair.[9]

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7. RACHEL MASI & JANICE L. COOPER, CHILDREN'S MENTAL HEALTH: FACTS FOR POLICYMAKERS (Nov. 2006), *available at* http://www.nccp.org/publications/pub_687.html.

8. *See generally* Goldberg v. Kelly, 397 U.S. 254, 266–68 (1970) (holding that welfare recipients have due process rights under the U.S. Const. amend. XIV, sect. I, to notice and a pre-termination hearing); 42 U.S.C. § 1396a(a)(3) (2000) (requiring that state plans for medical assistance provide an opportunity for a fair hearing if benefits are denied or terminated); 42 U.S.C. § 602(a)(1)(B)(iii) (2000) (requiring that states administering TANF programs offer hearings when benefits are denied or terminated); 42 C.F.R. §§ 431.200–431.250 (2007) (setting out procedures for Medicaid hearings); 20 C.F.R. §§ 416.1400–416.1461 (2007) (setting out procedures for SSI hearings); 7 C.F.R. § 273.15 (2007) (setting out procedures for Food Stamps hearings). *But see* Laura C. Conway, *Will Procedural Due Process Survive After Aid to Families with Dependent Children is Gone?*, 4 GEO. J. ON FIGHTING POVERTY 209, 219 (1996) ("[the TANF program now] requires only that states provide objective criteria for 'fair and equitable treatment, including an explanation of how the state will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process.' Whether providing for recipients to be heard means that states must provide the notice and elaborate pretermination hearings mandated by *Goldberg v. Kelly* is questionable.").

9. *See* Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearing the Cure?*, 12 GEO. J. ON POVERTY L. & POL'Y 13, 36 (2005) [hereinafter Lens, *Bureaucratic Disentitlement*] ("[S]ince the earlier studies . . . there have been virtually no empirical studies conducted on the fair hearing process."). *See also* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering For the Poor*, 56 BROOK. L. REV. 861, 882–87 (1990) (asserting that even in a post-*Goldberg* era of procedural "tailoring" to accommodate the plaintiff, the judicial branch retains the position and power to tailor); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timelines in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775 (1974) (extending earlier commentary on want of fairness and efficacy in welfare claim adjudication and offering that a management approach to the adjudication of welfare claims would better respond to due process

The primary providers of legal representation for those appealing decisions by welfare agencies have been Legal Services Corporation ("LSC")-funded programs throughout the country.[10] However, federal grants to provide civil legal services to low-income clients have been drastically reduced over the last twenty-five years,[11] leaving clients virtually without representation in the administrative hearing process.[12] Even in the best of times, representation in these hearings has been extremely low.[13] The vast majority of clients who disagree with the state or federal agency's decision to cut, deny or eliminate benefits must face the agency alone, put on evidence, argue the law—in sum, make their case to the judge.[14] They are on their own in this justice system, and

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concerns than adversarial system).

10. In 2003, LSC-funded programs closed over 126,000 cases concerning income and benefits. LEGAL SERVICES CORPORATION, 2003–2004 ANNUAL REPORT 8 (2004) [hereinafter ANNUAL REPORT], *available at* http://www.lsc.gov/about/pdfs/AnnualReport2003-2004.pdf.

11. In inflation adjusted dollars, the LSC funding of 1980 totaled $300 million, while the 2004 appropriation was less than half that amount at $147.3 million. *Id.* at 18–19. Currently, millions of poor Americans are ineligible for legal assistance because their incomes are just above the federal poverty threshold, and there is insufficient funding to meet the civil legal needs of those who do qualify:

> Despite LSC's current congressional support, the unmet legal needs of America's poor remain staggering. . . . [C]urrent federal funding is clearly inadequate to serve the civil legal needs of the more than 45.2 million poor Americans eligible for LSC-funded legal assistance. Millions of eligible clients are forestalled from pursuing justice every year. Still millions more—whose incomes are just above the federal poverty threshold but who nonetheless cannot afford adequate legal representation—are effectively denied access to the U.S. civil justice system as well.

*Id.* at 18.

12. Even in SSI cases, where attorney's fees for representation at administrative hearings are recoverable from back awards of benefits, 40% of claimants came to hearings without attorney representation. SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 78 (May 2006) [hereinafter SOCIAL SECURITY ADVISORY BOARD], *available at* http://http://www.ssab.gov/sumrDisabilityChartbook.shtml. The poor are more likely than others to be unrepresented in the civil legal system. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1788–90 (2001) [hereinafter Rhode, *Access to Justice*]. Manpower and funds for providing representation to those who can't afford it are scarce. Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1014 (2004) ("[F]ewer than 1% of American lawyers are in legal services practice, which works out to about one lawyer for every 1400 poor or near poor person, and a per capita annual expenditure for civil legal aid of only about $2.25. For that amount, not much due process is available."). As a result, the poor are more likely to either unsuccessfully navigate the legal system or choose to forego the system even with a meritorious claim.

13. The high-water mark for legal services funding occurred briefly in 1980 when the "minimum access" goal of two lawyers per 10,000 poor people was met for the first time. ANNUAL REPORT, *supra* note 10, at 18. In 1982, Congress cut LSC's budget by 25%, resulting in the closing of 285 legal services offices and the laying off of 1,793 attorneys and 952 paralegals. *Id.* The minimum access goal has not been met since 1980. *Id. See also* Cesar A. Perales, *The Fair Hearing Process: Guardian of the Social Service System*, 56 BROOK. L. REV. 889, 893 (1990) (noting that despite adherence of New York's administrative appeal system to the principles of *Goldberg v. Kelly*, the majority of appellants appeared pro se due to cuts in legal services). *Cf.* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 504, 110 Stat. 1321 (implementing cuts in funding for legal aid).

14. Statistics on representation at public assistance hearings on the state level are difficult to obtain. The Washington State Office of Administrative Hearings, which holds hearings for all

it is the only game in town.

At the same time that there are fewer legal representatives available, even more people are in need.[15] Given this combination of scarce benefits and overwhelming need, we must focus on the only process available for those who question the state's allocation of those limited benefits. If appellants are essentially on their own in the hearing process, and critical benefits are at stake, then we ought to make sure that the process itself is fair, accurate and errs on the side of eligibility for the benefits.

I propose that the public benefits hearing process is in fact fundamentally unfair to low-income appellants and that these appellants are almost always at a significant disadvantage in the hearing process. Given that this forum decides cases involving critical needs benefits, I suggest that this system needs a built-in safeguard to insure a more reliable and fair result for clients and to guard against agencies acting arbitrarily in their distribution of scarce resources. Specifically, I propose that the power imbalance that currently favors the state in the hearing process be leveled by shifting the burdens of production and persuasion[16] to the state and by instituting a clear and convincing evidence standard in all hearings involving the denial, reduction, overpayment, or termination of needs-based public assistance. I argue that a new, heavy, and appellant-favored burden of proof in these types of administrative hearings is the best method for achieving a socially just public assistance hearing system for the poor while at the same time meeting agency efficiency and policy needs.[17] Placing a "clear and convincing evidence" burden on the government is responsive to policy considerations regarding access to information, fairness, and risk allocation. Leveling the playing field by lifting the burden of proof from low-income appellants in our biased system should be a high priority for policy makers when the risk of an erroneous loss of life-sustaining benefits is so high.

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welfare programs in the state, gave me statistics for hearings held for the year of July 2005 through June 2006. In that year, of 11,722 hearing requests, only 112 had attorney representation (less than 1%). Of the 1,736 litigants who received a hearing, only 286 had representation (16%). Washington State Office of Administrative Hearings Statistics (on file with author) [hereinafter WA OAH Statistics].

15. In 2004, the U.S. Census Bureau reported that 12.7% of the population lives below the poverty line. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & CHERYL HILL LEE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004 9 (2005), *available at* http://www.census.gov/prod/2005pubs/p60-229.pdf. That was the fourth consecutive annual increase in poverty rates. *Id.* Overall, there were 37 million people living in poverty, up 1.1 million people from 2003. *Id.* More than 45 million people in the U.S. were without health insurance. *Id.* at 16.

16. Burden of persuasion means "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose," and burden of production means "a party's obligation to come forward with evidence to support its claim." Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994).

17. Note that I am not proposing that the solution to the inequity of the administrative hearing system for public assistance applicants is that lawyers be provided for all appellants. Representation alone does not solve the inequity of this system. *See infra* notes 18–29 and accompanying text.

There is an ongoing debate in the legal community about the best ways to provide justice for low-income civil litigants who cannot afford representation in their disputes with more powerful opponents, particularly in cases involving access to food, shelter, clothing, healthcare, income and protection of their children and themselves. Some argue that the best way of resolving this problem is to provide attorney representation to all who need counsel.[18] Those who favor a "civil Gideon"[19] believe that only attorney representation will level the playing field for low-income litigants who face eviction, loss of custody, or civil rights violations, or who find themselves in a dispute over eligibility for public benefits.[20] Some believe that attorney representation is critical, but argue that the more cost-effective method of providing equal access to justice is to increase and stabilize funding for legal services programs and pro bono programs and require all attorneys to do pro bono work.[21]

Others believe that counsel is not the solution. They argue that market forces allow those with money and power to buy better representation and use tactics that do not serve justice, even when the low-income client is provided with a lawyer.[22] Instead, some argue that court procedures need to be simplified and standardized in order to make it easier for pro se litigants to navigate the

18. *See, e.g.*, Simran Bindra and Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y (2003); Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317 (2001); John Nethercut, *"This Issue Will Not Go Away . . .": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 481 (2004); Symposium, *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 167 (2006).

19. "Civil Gideon" is a term used to describe efforts to establish a right to counsel in civil cases. The case that established this right in the criminal context was *Gideon v. Wainwright*, 372 U.S. 335 (1963). Anthony Lewis popularized Mr. Gideon's story in his book *Gideon's Trumpet*. ANTHONY LEWIS, GIDEON'S TRUMPET (Vintage Books 1989) (1964).

20. Indeed, the American Bar Association House of Delegates unanimously passed a resolution on August 7, 2006 that reads: "RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction." *See* American Bar Ass'n, Resolution of the House of Delegates 112A (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads /06A112A.pdf.

21. Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience—So Far*, 17 YALE L. & POL'Y REV. 469 (1998) (describing efforts to increase funding for legal services in New York State); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1884–85 (1999) (describing increase in pro bono hour requirement for District of Columbia attorneys).

22. *See* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access To Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 970 (2004) ("[T]he reality is that our legal system largely distributes legal services through the market and justice through an adversary system where the quality of legal services has a major influence.").

system alone. They favor increased use of such aids as pro se projects, do-it-yourself divorce kits, courthouse facilitators and self-help plus forms, postulating that civil Gideon will never happen or is not the best solution.[23] Some say the solution is placing an obligation on court clerks, judges, and opposing counsel to give advice and assistance to pro se litigants.[24] Finally, some argue that in civil cases where one party is pro se, the judge should play a more prominent role as an "active umpire" in the dispute in order to level the playing field.[25]

In my view, none of these proposed solutions effectively meets the needs of clients in the public assistance hearing system while preserving the basic tenets of administrative law. The administrative hearing system is designed to be a less formal and more flexible alternative to the court system, as well as a quick, efficient, and economical method of resolving disputes between clients and agencies.[26] While having a more active judge and better pro se materials can be helpful, these solutions do not tackle the injustices faced by appellants in the hearing process, where cultural differences, language ability, impaired health, lack of education and lack of access to information often present major barriers to a fair hearing.[27] Requiring lawyer representation for all welfare appellants does not adequately address the "underlying imbalance and fissures in the hearing room between clients and the hearing officer who judges them and the

23. *See, e.g.*, Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1549–73 (2005); Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1578–82 (2002); Rhode, *Access to Justice, supra* note 12, at 1816; RICHARD ZORZA, THE NATIONAL CENTER FOR STATE COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002), http://www.ncsconline.org/WC/Publications/Res_ProSe_SelfHelpCtPub.pdf.

24. *See, e.g.*, Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 46–49 (2002) (arguing that court staff should be trained to provide basic legal information to pro se litigants, that pretrial conferences should be conducted to prepare pro se litigants for trial, that judges should be authorized to assist pro se litigants and facilitate introduction of their evidence, and that judges should be allowed to ask questions, call witnesses, and conduct limited investigations).

25. Pearce, *supra* note 22, at 970; *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999).

26. *See, e.g.*, Christopher B. McNeil, *The Marginal Utility of Consolidated Agency Hearings in Ohio: A Due Process Analysis from an Economic Perspective*, 32 OHIO N. U. L. REV. 127, 127 (2006) ("Why, then, do state agencies take on the responsibilities of judging? In short, because doing so is an efficient means of resolving conflicts between the government and the governed. When compared to the use of judicial-branch structures like trial by jury, an agency adjudication is vastly more efficient: it uses less time and fewer governmental resources, it costs the participants much less, and it reaps an enormous benefit from having adjudicators who are specialists in the field and who actually know the policies contained within the controlling statutes and regulations. The agency becomes an adjudicator and steps into the judicial role; doing so has proven to be very effective in helping to make sure that claims involving property and liberty interests, that is, claims that are entitled to due process protection, are resolved with the least burden to all participants, as well as helping it ensure a fair and impartial decision-making process.").

27. *See infra* Part I.B.

agency representatives who question them."[28] I am proposing here a new avenue of redress which is less resource intensive and more responsive to the policy considerations of both government and citizens: lifting the burden of proof off indigent appellants and placing it on the state in all needs-based assistance hearings.[29]

In Part I, I examine the public assistance hearing system and show why it is the primary social justice mechanism for public benefits applicants and recipients. I describe the critical nature of public assistance and the importance of the hearing process in assuring access to those benefits. Using Washington State's appellant-oriented central panel system as well as other states' systems as examples, I show why appellants are at a significant and unfair disadvantage in the administrative hearing system. In Part II, I describe current practice in public assistance administrative hearings and demonstrate that generally the burden of proof is difficult to locate, inconsistently applied, or placed on the applicant or recipient challenging the agency decision.[30] In Part III, I argue that the burden of proof should be standardized in a way that favors the welfare benefits appellant: the government should bear the burden of proving ineligibility by clear and convincing evidence in all needs-based public assistance hearings. The policies that, in general, inform courts' and commentators' analyses of which party should bear the burden of proof—efficiency, access to information, fairness and risk allocation—all point toward placing the burden on the state in administrative hearings where critical needs are at stake. I examine other areas of administrative law and civil litigation in which the burden of proof has been placed on the government or its equivalent, rather than on the appellant. The policy considerations that dictate placing the burden on the state in these areas are equally or even more compelling in the public assistance arena. I detail methods for accomplishing this change. Finally, I discuss the impact that a burden shift would have: I respond to potential objections to this change by examining the fiscal, efficiency, and social justice implications of making the state prove a recipient's ineligibility for welfare benefits in every instance.

28. Vicki Lens, *In the Fair Hearing Room: Resistance and Confrontation in the Welfare Bureaucracy*, 32 LAW & SOC. INQUIRY 309, 330 (2007) [hereinafter Lens, *Fair Hearing Room*]. Lens suggests that an expansion of the standards of proof and the relevance of evidence in hearings would "subvert the hierarchy of power embedded in the bureaucracy. Instead of clients adapting to the bureaucracy, it would adapt to clients." *Id.* at 331.

29. *See infra* Part III.

30. While one might expect that the burdens of production and persuasion would be placed on the low-income appellant challenging the agency's decision to reduce, deny, or terminate benefits, in practice the burden allocation is often unclear. *See infra* Part II for my detailed discussion of this topic.

## I.
## THE ADMINISTRATIVE HEARING SYSTEM IS UNFAIR TO PUBLIC ASSISTANCE APPELLANTS

Two of the three factors that inform courts' and legislators' decisions about who should carry the burden of proof in a proceeding directly entail considerations of what might broadly be termed social justice. One primary consideration is who *ought* to be favored when comparing the risks and social costs between two potentially wrong decisions. Courts also consider fairness—in other words, which of the parties is in the greater position of power in the litigation and can therefore more easily bear the burden.[31] The third factor can also be analyzed in these terms: the burden of proving facts is often placed upon the party that has the best and easiest access to the relevant information in the case. This promotes the goal of procedural efficiency, but it also involves an inquiry into the difficulty and costs, for each party, of acquiring information.

The following overview of the obstacles facing appellants in public assistance hearings illustrates the gravity of the issues involved and lays the foundation for my argument that the policy concerns that govern burden setting strongly favor placing the burden on the government in this context. Subsection A examines the high stakes for clients who have been deprived of public benefits due to a denial of an application, a termination, a denial of particular services or equipment, or an overpayment assessment by a government agency. I also demonstrate that appellants have virtually no ability to successfully appeal an administrative hearing decision into the judicial branch, thus leaving the hearing as the only real forum for relief from agency error in determining welfare ineligibility. In other words, the social costs of a wrong decision for the applicant are overwhelming. Next, subsection B considers fairness and shows how the hearing process is stacked against the low-income appellant. It also touches on the fact that the information needed to make a determination of eligibility is more readily accessible to the government than to the applicant.

### *A. The Stakes Are High for Appellants in Public Assistance Hearings*

The policy considerations that lead courts and legislators to place the burden of proof on one party over another, and to set the standard of proof at the higher "clear and convincing" level, include the potential magnitude of one party's loss as compared to another.[32] Exceptions to the general "preponderance of the evidence" rule are made when important interests that need to be protected are at stake in the proceedings. Here, I will lay the foundation for the argument that both the assignment of the burden and the quantum of proof need to be changed

31. *See infra* Part III.B for a full discussion of the policies behind burden allocation.
32. *See infra* Part III.

because the cost of a wrongful termination of critical needs benefits is so onerous.

One of the primary purposes of public assistance is to meet the "brutal needs"[33] of the poor, in particular needy families with children,[34] and of those who are too old or disabled to work.[35] Welfare programs[36] like SSI, TANF, and state funded programs for the disabled like General Assistance for the Unemployable ("GA-U")[37] provide at least a subsistence level of income to those at or below the poverty level (who are also disabled, old, or have minor children with no other means of support). Because low-income families and individuals often rely on welfare programs as their sole means of support, an agency's decision to deny, reduce, or terminate this source of income can have a devastating impact.

There are numerous governmental programs designed to assist people who lack food, income, shelter, or healthcare. Below I highlight the major programs and show why they are critical to meeting the basic needs of recipients.

Food and nutrition are provided directly to eligible low-income individuals in the form of food stamps.[38] Congress recognized the critical nature of this benefit in its declaration of policy in the authorizing statute of the Food Stamp Program: "The policy of Congress [is] . . . to safeguard the health and well-being of the Nation's population by raising levels of nutrition . . . . Congress finds that the limited food purchasing power of low-income households contributes to

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33. Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (describing food, clothing, shelter, income, and health care as "brutal needs" and finding that the constitutional right to procedural due process includes the right to a fair hearing when access to such resources is denied). The *Goldberg* court wrote:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

*Id.* at 264. Subsequent decisions have limited the *Goldberg* presumption that public assistance denials involve matters of vital importance to clients. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (holding that in balancing an appellant's rights and needs with the government's interest in efficient adjudication, an evidentiary hearing is not required prior to termination of Social Security disability payments).

34. *See* 42 U.S.C. § 601(a)(1) (2000) (stating that the purpose of the TANF program is to aid needy families).

35. *See* 42 U.S.C. § 1381 (2000) (stating that the purpose of the SSI program is to aid individuals over 65, the blind, and the disabled).

36. For purposes of this article, I define "welfare" as financial, medical, housing, food, or other assistance aimed at meeting basic human needs that is provided to individuals or families by governmental entities based on the recipients' inability to pay.

37. *See, e.g.*, WASH. REV. CODE § 74.04.005(6)(a) (2001) (defining the scope of Washington's "General Assistance" program).

38. Food Stamp Program, 7 U.S.C. § 2011 (2000).

hunger and malnutrition . . . ."[39] The Food and Nutrition Service of the United States Department of Agriculture, the agency that administers the Food Stamp Program, describes the benefit as "the cornerstone of the Federal food assistance programs," which "provides crucial support to needy households."[40] Food Stamp recipients are made up of the most vulnerable and poor of our populace: 50% are children, 8% are elderly, and to be eligible recipients must have gross incomes of less than 130% of the national poverty guidelines.[41]

The two major programs that provide income benefits to needy families are TANF and SSI. The TANF program provides monthly income, training, and other benefits to low-income families that qualify.[42] TANF replaced Aid to Families with Dependent Children ("AFDC") benefits as part of Congress' 1996 welfare reform legislation, and created the new principle that the poor are not entitled to welfare benefits.[43] Adoption of the TANF program represented a sea change in how the government would provide public benefits to the poor.[44] In order to receive benefits, clients now are required to search for work or attend drug counseling and parenting classes.[45] If the client fails to show up for work, appear at an appointment, or is terminated from her job and has no good cause reason for lack of compliance, the state can impose sanctions against her family that include reducing or terminating their welfare grant.[46] A large number of administrative hearings are appeals by TANF clients of sanctions imposed and the resulting loss of much-needed income to the family.[47]

The SSI program was designed to provide a uniform minimum level of income[48] to the elderly (individuals sixty-five years of age or older), adults and

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39. *Id.*

40. U.S. Dep't of Agric., Food & Nutrition Serv., Food Stamp Program: FAQs, http://www.fns.usda.gov/fsp/faqs.htm#20 (last visited Nov. 3, 2007).

41. *Id.*

42. *See* 42 U.S.C. §§ 601(a)(1), 604 (2000).

43. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601–619 (1997)). Section 116 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) officially terminated entitlement to benefits under the "Aid to Families with Dependent Children" (AFDC) program. Pub. L. No. 104-193, § 116(c), 110 Stat. 2105, 2184 (codified as amended at 42 U.S.C. § 601 (2000)).

44. Lens, *Work Sanctions*, *supra* note 1, at 255 ("The Personal Responsibility and Work Opportunity and Reconciliation Act (PRWORA) of 1996 radically reshaped the landscape of welfare for women. The changes transformed a program designed to meet the material needs of poor women and their families into one primarily focused on preventing dependency through promoting work. PRWORA includes an array of behavioral-based reforms that mandate work and penalize its absence. One of the key tools for enforcing the work mandate is sanctions, which can include financial penalties. Women who do not comply with work rules can lose all or some of their cash assistance, food stamps, and Medicaid.").

45. *Id.* at 269 n.93.

46. *Id.* at 259–60. The authority for the imposition of sanctions against recipients who do not meet the work requirements is at 42 U.S.C. § 607(e) (2000).

47. *See* Lens, *Bureaucratic Disentitlement*, *supra* note 9, at 27 n.84.

48. In 2007 the Federal SSI benefit level for a single person was $623 per month. 20 C.F.R.

children with disabilities, and people who are blind.[49] It was the first national program created by Congress to insure that people whose income and assets are insufficient for survival or whose Social Security payments do not cover essential needs would have a guaranteed basic monthly income. Although the benefits are quite small, the SSI program has been remarkably successful in lifting our most vulnerable adults and children above the poverty threshold.[50] The inappropriate termination of such benefits thus thrusts these individuals back into poverty.

Another crucial benefit provided by public assistance is health care coverage. The primary needs-based public assistance program that covers healthcare is Medicaid.[51] Under Medicaid, eligible adult recipients receive a package of benefits called "mandatory services" that includes coverage of medically required emergency services, hospitalization, ambulance, nursing services, rehabilitation (including occupational and physical therapies), prescription medications and skilled nursing home care.[52] Most states also provide recipients with optional services that include home health coverage, durable medical equipment, personal care, case management, medical transportation, eye care, dental care and hearing aides.[53]

Eligible low-income children receive an even broader range of medical care than adults.[54] Under the Early Periodic Screening, Diagnosis and Treatment Program ("EPSDT"), children get regular check-ups and all medically necessary follow-up treatment for any conditions that are discovered.[55] Congress passed

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§ 416.410 (2007) (setting the level of benefits for 1996 post-welfare reform).

49. 42 U.S.C. §§ 1381–1383 (2000).

50. Gay Gellhorn, *Disability and Welfare Reform: Keep the Supplemental Security Income Program but Reengineer the Disability Determination Process,* 22 FORDHAM URB. L.J. 961, 965–66 (1995) ("[T]he program has been effective since its inception in closing the poverty gap for the vulnerable population of disabled adults and children. Comparison of the pre-SSI poverty gap in 1973 with the subsequent year under SSI showed that, in its first year, SSI eliminated 60% of the preexisting poverty gap for the disabled. Another statistical study a decade later analyzed 1990 data on the impact of the federal benefits program on the poverty status of children. Although the percentage of children in families with income under the poverty threshold had climbed to an alarming 22% in 1992, the number would have been vastly higher without the payment of federal social security and SSI benefits. These programs raised 1.1 million children above the poverty level and lessened the effects of poverty for 1.3 million more.") (citations omitted).

51. 42 U.S.C. §§ 1396–1396v (2000).

52. 42 U.S.C. § 1396a(a)(10)(A)(i) (2000) (incorporating by reference 42 U.S.C. §§ 1396d(a)(1)–(5), (17), (21) (2000)). *See also* Nora Flaherty, *Medicaid "Preferred Drug Lists": Florida as a Model for Analysis,* 11 ELDER L.J. 77, 82 n.37 (2003).

53. 42 U.S.C. § 1396a(a)(10)(A)(ii). *See also* Centers for Medicare and Medicaid Services, http://www.cms.hhs.gov/home/medicaid.asp (last visited Feb. 11, 2008).

54. 42 U.S.C. § 1396a(a)(43) (2000) (incorporating by reference 42 U.S.C. § 1396d(r) (2000)).

55. 42 U.S.C. § 1396d(r)(5) (2000). *See also, e.g.*, CAL. CODE REGS. 17, § 6802 (2005); 25 TEX. ADMIN. CODE, § 33.131 (2007); Official Washington State DSHS Web Site for EPSDT, http://www1.dshs.wa.gov/esa/EAZManual/Sections/HealthyKids.htm (last visited Feb. 12, 2008); Texas DSHS Web Site for Texas Health Steps, http://www.dshs.state.tx.us/thsteps/default.shtm (last visited Feb. 12, 2008); California Child Health and Disability Prevention Program Website,

the EPSDT program in recognition of the fact that children from poor families are at higher risk of disabling health problems or death than children living out of poverty. It sought to remedy this problem by providing a broader package of health services and preventive care.[56]

The denial or termination of any one of these medical services can be devastating. The stated purpose of the Medicaid Program is to furnish "medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[57] Therefore, the loss of this benefit could mean that needy children, elderly and disabled people would be unable to afford medically required services. Without surgery or a prescription drug, a Medicaid recipient may become disabled or die. A denial of home personal care services can result in a person being unnecessarily institutionalized in a nursing home. A person denied eye care or hearing aide services loses the ability to see or hear. Someone denied dental care may suffer in pain, lose teeth or forgo nutrition.[58] Without an appropriate wheelchair, a paraplegic may lose all mobility. The anxiety and fear of losing medical benefits itself can cause lasting mental health problems.

These possible results are not just hypothetical. They are happening every day as benefits are cut in state after state.[59] After a benefit is denied or a

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http://www.dhs.ca.gov/pcfh/cms/chdp/ (last visited Feb. 12, 2008).

56. U.S. Dep't of Health and Human Servs., Health Res. and Servs. Admin., http://www.hrsa.gov/epsdt/overview.htm ("[T]he purpose of the EPSDT program is 'to discover, as early as possible, the ills that handicap our children' and to provide 'continuing follow up and treatment so that handicaps do not go neglected.' Federal law—including statutes, regulations, and guidelines—requires that Medicaid cover a very comprehensive set of benefits and services for children, different from adult benefits. Since one in three U.S. children under age six is eligible for Medicaid, EPSDT offers a very important way to ensure that young children receive appropriate health, mental health, and developmental services.") (last visited Feb. 12, 2008).

57. 42 U.S.C. § 1396 (2000).

58. *See* Kyung M. Song, *Lack of Dental Care Leaves Poor in Agony*, SEATTLE TIMES, Jan. 30, 2007, at 1 ("[A]dvocates note that poor oral health is the root of a host of life-threatening and expensive medical problems that contribute to an overloaded health-care system."); Nicholas Bakalar, *Dental Health: Treating Gum Disease May Ease Other Ailments*, N.Y. TIMES, March 27, 2007, at F6; Mary Otto, *For Want of a Dentist*, WASH. POST, Feb. 28, 2007, at B1 (telling story of a twelve year-old boy who died from bacteria that spread from tooth to brain after family lost its Medicaid benefits).

59. In one case study, the government denied Medicaid coverage to "Michele," resulting in the hospitalization of her daughter with pneumonia, huge medical bills for her treatment, creditors calling the family day and night threatening jail time if she did not pay off the bills, and eventual garnishment of her wages to pay the medical debt. WASHINGTON STATE SUPREME COURT TASK FORCE ON CIVIL EQUAL JUSTICE, WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 23 (Sept. 2003), *available at* http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf. In 2003, one in seven low-income households in Illinois experienced a legal problem concerning public benefits (not including Medicaid, Medicare or other government sponsored health benefits); the most common problem was applying for or receiving food stamps; and 87.1% of public benefits legal needs were unmet. THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 18, 20, 36 (Feb. 2005) (on file with author). *See also* STATE BAR OF WISCONSIN, BRIDGING THE JUSTICE GAP: WISCONSIN'S UNMET LEGAL NEEDS 6 (Mar. 2007),

sanction imposed, the administrative hearing system is almost always the final check on an agency seeking to take away benefits that prevent malnutrition, illness, or even death. The already great costs of a wrong decision are rendered even more daunting by its finality.

When agency actions affect the lives of low-income families, the first place to go for a resolution of the dispute is not the judiciary, but to the executive branch's own court system—the administrative hearing system. As I will show, appeals to judicial branch courts of ALJs factual findings and legal conclusions are, available in theory, but difficult if not impossible for clients to achieve in practice. While all states are required to provide a judicial appeals process to clients denied benefits in hearings, the appeals process is unfair for several reasons: it is difficult for pro se appellants to navigate the procedures to perfect an appeal to court; once in the judicial branch, the reviewing court must defer to both the factual findings and legal conclusions made by the agency; and the exhaustion of administrative remedies doctrine requires low-income clients to bring their cases first in the administrative hearing setting. Together, these procedural and practical hurdles mean that the administrative hearing is, realistically, the only forum public assistance appellants have in which to present their legal and factual case challenging the welfare agency's decisions. Not only is the ALJ the trial judge and jury for the poor, the agency hearing is effectively the only forum for appeals. It is particularly important, therefore, that the process minimize the risks that a wrong decision poses to the claimant.

First, very few public assistance cases are appealed into the court system.[60] Public assistance appellants must raise their claims to benefits first in the administrative process rather than going directly into the independent judicial branch. The doctrine of exhaustion of administrative remedies requires all who dispute an agency action to use the entire available administrative hearing process first before filing in court.[61]

All fifty states are required by federal law to provide an administrative mechanism for welfare recipients and applicants to appeal agency decisions affecting their eligibility.[62] There are two basic administrative hearings structures in use for appeals of public assistance benefits: the central panel

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*available at* http://www.wisbar.org/am/template.cfm?section=bridging_the_justice_gap (reporting that the reduction or loss of public benefits is one of the two most frequently occurring legal problems facing the poor).

60. In Washington State in fiscal year 2006, only 29 cases out of the 1,765 final administrative hearing decisions issued affirming the welfare agency's denial of public assistance benefits were appealed by clients to the state court system. That constitutes less than 2% of appealable cases. WA OAH Statistics, *supra* note 14.

61. *See generally* William Funk, *Exhaustion of Administrative Remedies - New Dimensions Since* Darby, 18 PACE ENVTL. L. REV. 1 (2000) (discussing impact of 1993 Supreme Court decision limiting traditional rule governing exhaustion of administrative remedies). The exhaustion doctrine has limited exceptions for futility and irreparable harm. *See* McCarthy v. Madigan, 503 U.S. 140, 146–48 (1992).

62. *See supra* note 8.

system, in which the judges who hear welfare agency appeals are employed by a separate and independent agency;[63] and the hearing examiner within the agency system, in which those judges are employed directly by the same agency that made the underlying decision.[64] For programs that are administered solely by the federal government, such as SSI, hearings are held by the internal Social Security hearing officers, not by a separate and independent central panel.[65]

Although there is a legal process for appealing administrative decisions to court, the reality is that the agency hearing decision is, for the most part, the only and final appeal process available. A number of obstacles present themselves to those who wish to appeal to the federal court system, including the procedural difficulty of navigating an appeal to the judicial branch, a lack of funds to pay an attorney to perfect the appeal,[66] the difficulty of perfecting service on the agency, and the intimidation, as a pro se appellant, of facing an assistant attorney general. While the volume of cases filed in the administrative system is

63. In 2007, 26 states, the District of Columbia, and two cities employed central panels for some or all of their administrative agency hearings. They are: Alabama, Florida, Massachusetts, Oregon, Alaska, Georgia, Michigan, South Carolina, Arizona, Hawaii, Minnesota, Tennessee, California, Iowa, Missouri, Texas, City of Chicago, New Jersey, Washington, Colorado, Louisiana, New York City, Wisconsin, District of Columbia, Maine, North Carolina, Wyoming, Maryland, and North Dakota. Nat'l Ass'n of Admin. Law Judiciary, http://www.naalj.org/panel.html (last visited Feb. 12, 2008).

64. The state of Wisconsin is the only state where local agencies, rather than one statewide agency, administer its TANF program. Appeals of local agency decisions are heard by those, often private, agencies. Lens, *Bureaucratic Disentitlement*, *supra* note 9, at 40.

65. Attempts at creating a central panel for federal agencies have failed over the last two decades. *See, e.g.*, *Admin. Law Judge Corps Act: Hearing on H.R. 3910 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 22 (1992); *Admin. Law Judge Corps Act: Hearing on H.R. 1554 and H.R. 2726 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 1–2 (1988).

66. There is no right to publicly paid counsel in administrative hearings. For example, in SSI and Social Security administrative hearings, the only obligation of the Social Security Administration is to inform the appellant of the right to have legal representation at the hearing, but there is no right to have it provided free of charge and no requirement that the appellant appear with only a licensed attorney. *See* Evangelista v. Sec'y of Health & Human Servs., 826 F.2d 136, 142 (1st Cir. 1987) ("[T]he applicable standard in these 'nonadversarial' proceedings is well below the Sixth Amendment threshold."); Brandyburg v. Sullivan, 959 F.2d 555, 562 (5th Cir.1992) (citing Clark v. Schweiker, 652 F.2d 399, 403 (5th Cir. 1981) ("The Supreme Court has never recognized a constitutional right to counsel at an SSA hearing.")); Frank v. Chater, 924 F. Supp. 416, 422 (E.D.N.Y. 1996) ("[a]s an initial matter, it is necessary to clarify what the cases in this and other Circuits casually refer to as the 'right to representation' in a benefits proceeding. This 'right' does not rise to constitutional dimensions."). As a result, HHS is not obligated to provide counsel for the claimant, Lopez v. Sec'y, Dep't of Health & Human Servs., 728 F.2d 148, 149 (2d Cir. 1984), or to "guarantee the availability of free legal services," Clark v. Schweiker, 652 F.2d 399, 403 (5th Cir. 1981). Rather, the "right to representation" articulated in these cases refers to a claimant's freedom to choose to be represented by counsel in a benefits proceeding. *But see* Lisa Brodoff, Susan McClellan & Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609 (2004) (arguing that the Americans with Disabilities Act requires an attorney accommodation in the court or administrative hearing process when a litigant's disability prevents him or her from accessing the court system).

overwhelming,[67] the number of public assistance appeals taken into the judicial branch is relatively very small. Statistics have not been compiled for all public benefits cases, but in Social Security Disability Insurance and Supplemental Security Income Disability cases in fiscal year 2005, trial-like hearings in which the agency decides the facts and law of a case were held in approximately 13% of cases.[68] Only about 2% of those whose cases were heard by an ALJ—or 0.3% of the total number of those filing cases or having their eligibility reviewed—went on to appeal their decisions to the federal court system.[69]

Even for those who are able to get their case into the judicial branch courts, those courts' review of the agency's factual findings is very deferential, and the appellant's ability to introduce new evidence is extremely limited. The standard of review for determining the validity of facts (the who, what, when, where, how, and credibility determinations) is the "substantial evidence test."[70] The

67. The Social Security Administration, which administers both the Social Security and Supplemental Security Income benefit, hears and decides more than ten times the number of cases tried by all federal judges combined. RICHARD J. PIERCE, JR., 2 ADMIN. L. TREATISE § 9.10, at 693 (4th ed. 2002). In fiscal year 2005 over 500,000 Social Security and SSI claimants had their appeals heard by ALJs. *See* SOCIAL SECURITY ADVISORY BOARD, *supra* note 12, at 91. In that same year 12,360 cases were appealed to the federal courts. *Id.* In Washington State alone, 11,722 public assistance hearing requests were filed in fiscal year 2005. WA OAH Statistics, *supra* note 14.

68. SOCIAL SECURITY ADVISORY BOARD, *supra* note 12, at 91 (showing that in fiscal year 2005 in DI and SSI Disability cases, 2,570,831 initial claims were filed and 1,518,235 continuing disability reviews took place; there were ALJ dispositions of 509,390 of the initial claims and 14,972 of the continuing disability reviews). In Washington State, of the 11,722 hearing requests filed, only 1,736 (15%) went to a full administrative hearings. WA OAH Statistics, *supra* note 14.

69. Statistics are only available nationally on appeals of Social Security and SSI disability claims, not on all welfare appeals. Even there, where attorney representation is common, only 2.3% appeal to federal court after a hearing decision denying benefits. SOCIAL SECURITY ADVISORY BOARD, *supra* note 12, at 91 (showing that while a total of 4,089,066 initial claims and continuing disability reviews were processed in fiscal year 2005, there were only 12,360 federal court decisions on appeals from agency dispositions of these cases). In Washington State, of the 1,736 hearings held, the agency decision denying benefits was only reversed 292 times (in other words, the appellant won 16% of the time). WA OAH Statistics, *supra* note 14. In all of fiscal year 2005, there were only twenty-nine appeals taken into the court system by low-income clients (less than 2% of the total number who received an adverse final decision from the agency). *Id.* These numbers are even more striking when one considers that over 11,000 hearing requests were filed initially: about 0.25% of those claimants eventually had their cases heard in state court. *Id.*

70. *See, e.g.*, TEXAS GOV'T. CODE. ANN. § 2001.174(2)(E) (2000) (a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole); COLO. REV. STAT. CODE ANN. § 24-4-106-7 (Court shall affirm agency findings if supported by substantial evidence); WASH. REV. CODE § 34.05.570(3)(e) (2003) ("The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter"); CHARLES H. KOCH, JR., 3 ADMIN. L. & PRAC. § 10.9 (2d ed. 1997) ("substantial evidence means that the record contains enough evidence that a reasonable mind might accept in support of the agency's conclusions").

reviewing court will determine if there was some evidence in the record that would allow a reasonable person to reach the ALJs finding.[71] Even if the weight of the evidence favors the public assistance appellant's version of the facts, the judicial branch court cannot overturn the finding.[72] And unless there are exceptional circumstances, no new trial is held, and no additional evidence is taken.[73]

The ability to raise new legal issues on review is also limited.[74] The judicial branch court sits as an appellate court. The judge reviews the written transcript of the administrative hearing, all the exhibits, and the ALJ's written findings of fact and conclusions of law. A public assistance appellant must not only be savvy enough to have put on all the testimony and exhibits necessary for the ALJ to make favorable factual findings, she must also have spotted and raised all the legal arguments and defenses she could have at the hearing, because she will have almost no opportunity to correct any mistakes in court.[75] Even if the appellant is able to raise all the appropriate legal issues at the administrative

71. *See* Goshen Irrigation Dist. v. Wyoming State Bd. of Control, 926 P.2d 943, 951 (Wyo. 1996); Cache County v. Property Tax Div. of Tax Comm'n, 922 P.2d 758, 767 (Utah 1996); Qualman v. State, Dept. of Employment, 922 P.2d 389, 392 (Idaho 1996); Fitzhugh v. New Mexico Dept. of Labor, 922 P.2d 555, 562 (N.M. 1996). *See also* WASH. REV. CODE § 34.05.570(3)(e) (2003) ("The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter").

72. The Supreme Court has interpreted the substantial evidence standard to be extremely deferential. *See* RICHARD J. PIERCE, JR., 2 ADMIN. L. TREATISE § 11.2 (2007 Cum. Supp.); NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) ("Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established."); Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (stating that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); Universal Camera v. NLRB 340 U.S. 474, 491 (1951) (holding that if an agency's finding is supported by substantial evidence a court will intervene only in the rare instance when the standard has been misapprehended or grossly misapplied).

73. *See e.g.*, N.C. GEN. STAT. ANN. § 150B-49 (West 2007) (no new evidence allowed on judicial review unless material to the issues, not cumulative, and could not have reasonably been presented at the administrative hearing); WASH. REV. CODE ANN. § 34.05.554 (2003) (strict limitations on raising new issues); WASH. REV. CODE ANN. § 34.05.558 (2003) (judicial review of facts confined to record); WASH. REV. CODE ANN. § 34.05.562 (2003) (strict limitations on admission of new evidence); Johnson v. Heckler, 741 F.2d 948, 952 (7th Cir. 1984) ("Judicial review of the administrative law judge's decision is limited to an evaluation of that decision .... A trial *de novo* is improper."); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980) (noting that if the agency "has applied proper legal principles, judicial review is limited to an assessment of whether the findings of fact are supported by substantial evidence").

74. *But see* Sims v. Apfel, 530 U.S. 103, 112 (2000) (holding that Social Security claimant does not waive judicial review by failing to present issue in request for review because issue exhaustion is not required by regulations or statute and non-adversarial administrative proceeding is unlike court proceeding).

75. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1323–25 (1997) (arguing that issue exhaustion is inappropriate in an administrative setting where most appellants are either unrepresented or represented by non-attorneys and where the ALJ theoretically shares responsibility for raising issues).

level, convincing a court to overturn the agency's legal interpretations will be difficult because of the deference courts give to an agency's permissible construction of its governing statutes.[76]

In these cases with potentially grave consequences, then, the ALJ's decision is likely to be either actually or effectively the last word. With so much at stake when an agency makes the wrong decision, it is imperative that the hearing system be designed to guard against wrongful denials and err on the side of eligibility.

### *B. Administrative Hearings Are Unfair Forums for Public Assistance Appellants*

Under the current administrative hearing system, public assistance appellants are at a significant disadvantage when faced with the resources and power of the state.[77] Even in central panel states, where the agency hearing the case is distinct from the original agency deciding the case, there are huge barriers for appellants to overcome if they are to prevail in their attempt to obtain or maintain their benefits. The central panel hearing system was developed as a way for states both to create an adjudicatory process that appeared less biased and more equitable and to save taxpayer dollars.[78] State administrative law judges who had each previously been housed, trained, and funded by one of the numerous state agencies individually were all drawn into a separate hearings agency. Under this system, judges could be trained to hear several different types of cases and could more efficiently and effectively respond to the changing

76. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (holding that where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

77. In Washington State, of the 11,722 appeals of denials of public benefits filed in fiscal year 2005, 9,140 appellants either defaulted or withdrew their requests. WA OAH statistics, *supra* note 14. Of the 1,736 hearings held, only 292 appellants prevailed, or 16% of those that went to hearing. *Id.* A recent study of TANF sanction hearings in Texas, New York, and Wisconsin, the first study of welfare administrative hearings since welfare reform, revealed that appeal rates were very low, at 0.29%, 4.6%, and 0.46%, respectively. Lens, *Bureaucratic Disentitlement*, supra note 9, at 42. Clients withdrew their requests in 13 to 24% of cases and appeals were dismissed for nearly half of cases in Texas and New York (only 15% in Wisconsin) because clients failed to appear for the hearing. *Id.* at 45–46. Notably, those appellants who make it all the way through the hearing process are relatively successful, obtaining reversals of the sanction between 40% and 80% of the time. *Id.* at 46. However, the data showed that very few clients requested hearings and "a disturbing trend . . . is the percentage of clients who abandon their requests for a hearing, especially in Texas and New York, where nearly half of clients do not follow through with a hearing . . . ." *Id.* at 49. Other than these TANF sanction hearing statistics and the Washington State OAH statistics, I could find no statistics on the reversal rates for clients who appeal Medicaid, Food Stamps, and other types of assistance in other jurisdictions.

78. *See* Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 479–81 (2001); John W. Hardwicke, *The Central Panel Movement: A Work In Progress*, 53 ADMIN. L. REV. 419, 421–30 (2001).

hearing needs of government. Also, once the adjudicatory function was severed from the executive agency that made the initial decision, the hearing participants would have greater confidence that the hearing officer would decide the case independently and fairly.[79]

Because central panel systems appear to be the most fair to appellants, in that the agency deciding the issue is separate from the welfare department initially denying benefits,[80] I will focus on that system. For as I will demonstrate in this subsection, even in that "independent" hearing system, appellants are at a steep disadvantage. They face a panoply of problems: their lack of legal representation; the complexity of the hearing system in general and public assistance law in particular; the effects of poverty, limited education, and disabling health conditions on their ability to argue a case; the inability to speak English; the inaccessibility of records needed to put on a case; the requirement that the hearing officer apply the lowest level of law rather than higher authority; the generally pro-government culture of ALJs; and biases held by judges against people in poverty.

First, the vast majority of public assistance appellants appear at their hearings pro se.[81] It goes without saying that representing oneself, even for people with an advanced degree and adequate financial resources, is a daunting proposition.[82] When a pro se litigant's income, assets, healthcare and well-being

79. *See* McNeil, *supra* note 78, at 479 ("The promise of a central panel is that the forum for litigating these policy-driven issues will be fair in both appearance and reality."); Hardwicke, *supra* note 78, at 424–25 (discussing independent and objective judgment as the dominant goal of the central panel movement).

80. Frank Sullivan, Jr., *Some Questions to Consider Before Indiana Creates a Centralized Office of Administrative Hearings*, 38 IND. L. REV. 389, 392 (2005).

81. In Washington State in fiscal year 2006, for example, only 16% of public assistance appellants appeared at their hearings represented by counsel. WA OAH statistics, *supra* note 14. Deborah L. Rhode states that, in civil proceedings, most low- and middle-income people lack any affordable access to legal services, and that about "four-fifths of the civil legal needs of the poor, and . . . two- to three-fifths of the needs of middle-income individuals remain unmet." Rhode, *Access to Justice, supra* note 12, at 1785. "The nation has only about one legal aid lawyer or public defender for every 4,300 persons below the poverty line compared with a ratio of one lawyer for every 380 Americans in the population generally." *Id.* at 1788. In Washington state, a recent study found that 87% of low-income households experience a civil legal problem each year, 8% experience a public benefits problem, and 88% of low-income people face their legal problems without help from an attorney. WASHINGTON STATE SUPREME COURT TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, CIVIL LEGAL NEEDS STUDY: EXECUTIVE SUMMARY (Sept. 2003), *available at* http://www.courts.wa.gov/newsinfo/content/taskforce/legalneedsexecsummary.pdf. *See also* UTAH LEGAL SERVICES, THE JUSTICE GAP: THE UNMET LEGAL NEEDS OF LOW-INCOME UTAHNS 15 (Apr. 2007), *available at* http://www.uls.state.ut.us/ (follow "The Justice Gap: The Unmet Legal Needs of Low-Income Utahns" hyperlink) (stating that in 2004–2005, 8.8% of low-income Utah households with public services legal issues sought legal aid, compared with 18.4% of low-income households that experienced some sort of legal need.).

82. *See* Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 LAW & SOC'Y REV. 627, 650 (1992) (showing that the more legally formal the hearing, the more likely representation helped the client prevail); Swank, *supra* note 23, at 1548 (noting that even those who elect to represent themselves demand more time and resources from the courts than those represented by counsel).

are on the line, he or she faces formidable emotional barriers to articulating a clear case and proving facts. In the best circumstances it is difficult to keep a clear head and an objective view of the strengths and weaknesses of the case. Even a lawyer who represents himself "has a fool for a client."

Despite the fact that administrative hearings are not as formal as hearings held by judges in court, the administrative hearing process is difficult for appellants to navigate.[83] It can be a scary, intimidating, and complex process that involves court-like procedures, public speaking, motion practice, entry of exhibits, objections to evidence, and an understanding of complicated laws and procedures.[84] Appellants must master all of this in front of an adversary who knows the law and the procedures, and a judge who expects that the parties will be able to put on a case.[85]

Ironically, the same traits that cause people to need public assistance—poverty, advanced age, or disability—can also seriously disadvantage them in

83. *See* Lens, *Bureaucratic Disentitlement*, *supra* note 9, at 34 ("Virtually from the time fair hearings were suggested as an antidote to bureaucratic excess or errors, commentators have expressed doubts that clients would use the fair hearing process, or use it well. The reasons cited vary, ranging from the practical to the philosophical, from bureaucratic limitations to client limitations."); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1192–1193 (2000) ("[O]bservers have pointed out that the protections accorded by individual administrative hearings are frequently an inadequate means of redressing unfair and inequitable administration even in individual cases. A system that relies on individuals to come forward and assert grievances presupposes that individuals have knowledge of their rights, can identify wrongs, and are aware of the remedies. Each of these conditions is frequently lacking in the public benefit programs arena."); Wash. State Office for Admin. Hearings, Glossary for Admin. Hearings, *available at* http://www.oah.wa.gov/glossary.shtml (last visited Feb. 12, 2008).

84. *See, e.g.*, WASH. REV. CODE § 34.05.446 (2003) (describing procedures for subpoenas, discovery and protective orders); *id.* § 34.05.452 (describing rules of evidence and cross examination procedures). *See generally* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 143–48 (1989) (providing descriptive overview of on-the-record hearings); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 811 (1974) ("Although general information about AFDC may be widespread, specific knowledge which would suggest a challenge to bureaucratic judgments is not widely held."). The ALJ has a panoply of judge-like powers, including the ability to issue subpoenas, rule on offers of proof, receive evidence, and conduct settlement conferences. *See* 5 U.S.C. § 556(c) (2000).

85. *See* Vargas v. Sec'y of Health & Human Servs., 838 F.2d 6, 9 (1st Cir. 1988) (rejecting pro se claimant's contention that ALJ did not do enough to help her develop her record when she did not understand the need for additional evidence). Courts agree that attorney representation in the context of establishing eligibility for SSI and Social Security Disability can be critical to obtaining benefits. *See* Frank v. Charter, 924 F. Supp. 416, 427–28 (E.D.N.Y. 1996) ("The potential benefits of having counsel at a benefits proceeding are well recognized. Indeed, the heightened duty placed on the ALJ by this Circuit is an attempt to compensate for the disadvantage of proceeding without counsel . . . . The high rate of remand may well be a function of the fact that, '[u]nder our system of adjudication, no hearing officer (or judge) will ever be an equivalent substitute for a lawyer devoted exclusively to a party's interests. Cases such as the present one will repeatedly arise until the legal services bar translates into action the now commonplace observation that agency cases are usually won or lost at the agency level.'") (citing Guzman v. Califano, 480 F. Supp. 735, 737 (S.D.N.Y. 1979)).

hearings. Poverty can prevent low-income appellants from perfecting and arguing their appeals in several ways. For example, TANF clients who have failed to comply with the work search rules because of poor health or disability, or who lack access to transportation and are subsequently sanctioned will presumably experience the same obstacles in attending hearings.[86] Low-income appellants can also have difficulty finding and paying for childcare, so their young children commonly attend their hearings. As a result, they often cannot present their cases in the best light because they must simultaneously supervise their children's behavior. Poverty can also mean a lack of good nutrition, inadequate housing or no housing at all, and other stresses that make the presentation of legal and factual issues at a hearing yet more difficult.[87]

People living in poverty are statistically much more likely to be at an educational disadvantage as well.[88] Even before the hearing begins, lack of education sets clients up for failure. Not only must they deal with sophisticated legal issues in front of an ALJ who is a lawyer, they are also opposed by a department representative who is usually college educated and who has received training on legal representation and welfare program eligibility.[89]

Appellants with physical or mental disabilities experience enormous added challenges in the hearing process.[90] Their inability to see or hear adequately

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86. *See* Lens, *Work Sanctions*, *supra* note 1, at 264 ("Several studies have demonstrated that clients' reasons for noncompliance are frequently linked to their disadvantaged status, or obstacles that interfere with work. For example, in California, a survey of local county welfare offices and advocacy groups listed illness or a disability (84%), followed by a lack of transportation (70%) and then child care (42%), as the most common reasons why clients were unable to comply with the work rules. In New York, recipients reported lack of transportation or child care, illness, or the need to care for a sick relative as the most common reasons for why they failed to comply. Similarly, a survey of sanctioned families in Utah revealed that a third of families cited health problems as the reason they did not comply. In Iowa, the three most common reasons cited by clients for not complying with the work rules were a serious personal issue or health problems (29.6%), a lack of transportation (27.8%), and a lack of child care (20.4%).") (citations omitted).

87. *Cf.* Mashaw, *supra* note 84, at 812 ("[It is not] realistic to view a claimant who may be chronically dependent as prepared to fight city hall even when basic entitlement to benefits is at issue.").

88. SHEILA R. ZEDLEWSKI, WORK AND BARRIERS TO WORK AMONG WELFARE RECIPIENTS (2002), *available at* http://www.urban.org/publications/310836.html (stating that according to the National Survey for American Families conducted by the Urban Institute, 41.8% of welfare recipients lacked a high school diploma in 2002).

89. *See infra* notes 99–104 and accompanying text.

90. *See, e.g.*, WASHINGTON STATE ACCESS TO JUSTICE BOARD IMPEDIMENTS COMMISSION, ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR WASHINGTON COURTS (Aug. 2006), *available at* http://www.wsba.org/atj/ensuringaccessguidebook.pdf; JO WILLIAMS, NATIONAL CENTER FOR STATE COURTS, COMMUNICATION ACCESSIBILITY IN THE COURTS (2002), *available at* http://www.ncsconline.org/WC/Publications/CS_ADAAccFairnessPub.pdf; OFFICE OF THE FLORIDA STATE COURTS ADMINISTRATOR, ACCESS TO THE COURTS FOR PERSONS WITH DISABILITIES: RENEWING THE JUDICIAL BRANCH COMMITMENT (2006), *available at* http://www.flcourts.org/gen_public/pubs/bin/accesstocourts.pdf; JUDICIAL BRANCH OF GEORGIA, A MEANINGFUL OPPORTUNITY TO PARTICIPATE: A HANDBOOK FOR GEORGIA COURT OFFICIALS ON COURTROOM ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES (2004), *available at* http://www.georgiacourts.org/agencies/gcafc/handbook_intro.html#main.

affects their ability to obtain and provide information to the hearing officer or agency.[91] Persons with mental retardation or other developmental disabilities may be completely unable to comprehend their hearing issues, let alone represent themselves at the hearing.[92] Yet they are required to do just that because there is no established right to counsel in this context, even when the extent of a person's disability or illness clearly prevents her from having the stamina or mental acuity to put on a case.[93]

Appellants who do not speak English are at a special disadvantage in the hearing process. Even assuming excellent translation services, unrepresented non-English speaking appellants can have difficulty understanding the administrative hearing system, the law that applies, and how to present their case.[94] Both the Second Circuit Court of Appeals and the California Supreme Court have held that Constitutional Due Process does not require welfare agencies to give written notices of benefits terminations and reductions in a language other than English.[95] In the cases giving rise to those opinions, Spanish-speaking welfare and SSI recipients received notices, written in English, that terminated their benefits.[96] They failed to make timely requests for hearings challenging the denials, and as a result, they immediately lost both their benefits and the right to appeal.[97] Similarly, in some states, the hearings office refuses to provide a written translation of the administrative hearing decision in the appellants' native language, opting instead to have the translated decision read to the appellant over the phone.[98] Hearing decisions can be complicated

91. *See* WASHINGTON STATE ACCESS TO JUSTICE BOARD IMPEDIMENTS COMMISSION, *supra* note 90, at 15–24.

92. *See* Hines v. Bowen, 671 F. Supp 10, 12 (D.N.J. 1987) (holding that plaintiff raised a colorable constitutional claim that he suffered from a mental incapacity which rendered the notice provided by the Secretary inadequate); Manning v. Sec'y of HHS., No. 83 CV 1782, 1985 WL 71751, at *2 (E.D.N.Y. Feb. 27, 1985) (stating that claimant presented a colorable argument that she failed to understand and act upon the notice she received because of her mental condition); Brittingham v. Schweiker, 558 F. Supp. 60, 61 (E.D. Pa. 1983) (examining issue of whether plaintiff had colorable claim based on inability to understand administrative appeal procedures due to mental illness). Richard McNally, *Autism and the Courts*, DISABILITIES PROJECT NEWSLETTER (State Bar of MI), Dec. 2005, *available at* http://www.michbar.org/programs/Disabilities_news_5.html.

93. There is currently no right to paid counsel in the administrative hearing setting. *See supra* note 66.

94. *See generally* Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543 (2004).

95. Soberal-Perez v. Heckler, 717 F.2d 36, 43 (2nd Cir. 1983) ("A rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process."); Guerrero v. Carleson, 512 P.2d 833, 833 (Cal. 1973) ("[A]lthough in appropriate cases the use of Spanish in these and similar notices would be desirable and should be encouraged, it does not rise to the level of a constitutional imperative.").

96. *Sobreal-Perez*, 717 F.2d at 37; *Guerro*, 512 P.2d at 834.

97. *Id.*

98. *See, e.g.*, WASH. ADMIN. CODE 388-02-0150 (1) (2005) ("When an interpreter is used at a

documents that include multiple findings of fact and conclusions of law and cite to many applicable statutes and regulations. As a matter of common sense, it is virtually impossible to figure out how to appeal such a complex decision if the only way to review it is by listening to it over the phone. This feat would be difficult for an attorney, let alone a lay person who has no legal training and who cannot speak or read the language of the decision.

Public assistance appellants face disadvantages in the hearing process beyond those created by poverty, disability, age, education, or language. They are disadvantaged by the fact that the state is always represented by an experienced advocate in the hearing.[99] In most states, the agency denying benefits is represented at welfare hearings either by a trained "fair hearing coordinator," by an in-house attorney, program manager or supervisor, or by the Attorney General's Office.[100] Even fair hearing coordinators, though not attorneys, are sophisticated in their ability to represent the client agency.[101] They receive training on the fair hearing process, development and presentation of evidence, arguing the law, and prehearing motion practice.[102] Having done

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hearing, the ALJ must explain that the decision is written in English but that a party using an interpreter may contact the interpreter for an oral translation of the decision at no cost to you."); 1 TEX. ADMIN. CODE § 357.410 (a) (2007) ("The Texas Department of Human Services (DHS) shall provide a translated coversheet in Spanish for hearing decisions where an interpreter was used. The coversheet will include a short translated statement regarding the outcome of the hearing and instruct the appellant to call the hearing officer if he needs assistance to understand the decision. An appellant who indicates by telephone or in person, or in writing that assistance is needed to understand the decision shall receive an explanation of the hearing decision from bilingual personnel within a reasonable period of time.").

99. For example, in Oregon, the agency is represented by either an attorney or an agency representative. *See* Oregon Office of Admin. Hearings, Representing Yourself, http://www.oregon.gov/OAH/Representing_Yourself.shtml (last visited Feb. 12, 2008). In Texas, the agency is usually represented by a state-employed attorney. *See* Texas State Office of Admin. Hearings, Frequently Asked Questions about SOAH, http://www.soah.state.tx.us/AboutUs/faq.htm (last visited Feb. 12, 2008). In North Carolina, the agency is always represented by an attorney. *See* North Carolina Office of Admin. Hearings, Hearings—Frequently Asked Questions, http://www.oah.state.nc.us/hearings/faq.html#31 (last visited Oct. 17, 2007).

100. For example, in California, the government is represented by an "Appeals Officer." *See* LEGAL SERVICES OF CA, REPRESENTING YOURSELF AT HEARING: TIPS TO SUCCEED (2004), *available at* http://www.lsnc.net/fact_sheets/self_rep_blank.pdf. In Illinois, the agency is represented at the hearing by the caseworker supervisor. *See* Illinois Legal Aid, Appealing a Decision by the Illinois Dep't of Human Services, http://www.illinoislegalaid.org /index.cfm?fuseaction=home.dsp_content&contentID=4129 (last visited on Feb. 12, 2008). In Washington State, "fair hearing coordinators" represent the agency in all public assistance cases except Medical Assistance. *See* Welfare Rights Organizing Coalition, A Self-Help Guide to Fair Hearings, http://www.wroc.org/factsheets/fairhearing.htm (last visited Feb. 12, 2008). In those hearings, the agency is represented by in house attorneys.

101. *See, e.g.*, HUMAN SERVICES COUNCIL, JOB DESCRIPTION, *available at* http://www.humanservicescouncil.com/docs/fairhearingCMDesc0914.pdf (describing duties of Fair Hearings Coordinator in Washington State) [hereinafter JOB DESCRIPTION]; DSHS, ELIGIBILITY A-Z MANUAL, http://www1.dshs.wa.gov/esa/eazmanual/sections/FHcoordRole.htm (last visited on Feb. 12, 2008) (same).

102. *See, e.g.*, PRELIMINARY INFORMATION: OMDR/DD MEDICAID STATE HEARING TRAINING SEMINARS FOR COUNTY BOARDS OF MRDD, *available at* http://odmrdd.state.oh.us/training

numerous hearings on a daily or weekly basis, they know the judges who hear the cases and are very familiar with the hearing format. Unlike their pro se opponent, they also know how to access the statutes, regulations and internal manuals governing benefits programs.[103] The government's representatives can easily acquire the prior decisions of the particular ALJ assigned to the case or other hearing decisions on the issue at hand to predict the outcome of the case and strategically develop their arguments. On the other hand, the pro se appellant has little opportunity to educate herself about the law in this area since ALJ decisions have no precedential value and, in any case, are not usually published.[104]

But even if pro se appellants could get access to prior decisions and law, it would do them little good because public benefits law is so complex that it is virtually unreadable by the lay person. The federal and state Medicaid statutes have been described as "almost unintelligible to the uninitiated,"[105] as "labyrinthinan,"[106] and as the regulatory equivalent of the "Serbonian bog."[107] Appellants' likely inability to decipher the law, assuming they can find it, puts them at a major disadvantage against the trained agency representative.

The agency has another advantage in the hearing process when expert witnesses are needed to prove a claim. Welfare agencies can and do call their own doctors, dentists, nurses, and program managers, to testify as paid experts as to why the appellant does not meet physical or mental disability standards, why the requested service is not medically necessary, or why program rules prohibit eligibility. The appellant must figure out how to cross examine these state-employed experts on her own, with no expert testifying on her behalf to counter the opinion put forth.[108] Finding and hiring expert witnesses who can testify to

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/docs/MedicaidState-agenda.pdf (outlining training program for Ohio hearing coordinators); C.J. WITHEROW, COMMUNITY MENTAL HEALTH PARTNERSHIP OF SOUTHEASTERN MICHIGAN, GRIEVANCE & APPEALS TRAINING FOR PROVIDER STAFF, *available at* http://ewashtenaw.org/government/departments/cmhpsm/provider_information/Provider%20Training%20Resources/Grie%20AppeTrain.pdf (outlining training for Southeastern Michigan hearing coordinators).

103. *See* JOB DESCRIPTION, *supra* note 101.

104. The doctrine of stare decisis is generally not applicable to administrative proceedings. 2 ADMIN. L. & PRAC. § 5.67(4) (2d ed. 1997). Neither agencies nor the courts are bound by previous agency decisions. *Id. See also* Texas v. United States, 866 F.2d 1546, 1556 (5th Cir. 1989) ("An agency . . . is not bound by the shackles of stare decisis to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past.").

105. Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976) (Friendly, J.).

106. Roloff v. Sullivan, 975 F.2d 333, 340, n.12 (7th Cir. 1992).

107. Cherry v. Magnant 832 F. Supp. 1271, 1273 n.4 (S.D. Ind. 1993). *See* JOHN MILTON, PARADISE LOST book 2, lines 592–94, at 183 (Roy Flanagan ed., Macmillan Publishing Co. 1993) (1667) ("A gulf profound, as that Serbonian bog Betwixt Damiata and Mount Casius old, Where armies whole have sunk.").

108. *See, e.g.*, DSHS Hearings Guide, http://www.oah.wa.gov/DSHS.shtml (last visited Feb. 12, 2008); Representing Yourself in a DDS Hearing (2003), http://www.documents.dgs.ca.gov/oah/forms/fair%20Hearing%20Brochure%202003-11-19.pdf (last visited Feb. 12, 2008) (explaining that although evidence may be presented by claimant in the form of letters or written statements, it is generally more convincing to have expert witnesses

such issues as the medical disability of the applicant, the need for medications or equipment, or the financial value of assets is difficult at best for low-income appellants in the hearing process. Yet, this expert testimony can be the decisive evidence in a benefits eligibility case.[109]

Many agencies now require that appellants rely not on the medical opinion of their own doctors for proof of their need for services but on double-blind research studies.[110] As resources have become scarcer, state governments have developed more sophisticated requirements for proving the medical necessity of medical services, equipment, and prescription drugs.[111] Where once an appellant could prove her need for services by obtaining a supportive letter from her doctor, now sophisticated medical and statistical research may be required to prove her eligibility.[112] For the unrepresented public assistance appellant, this can be an insurmountable obstacle to winning at the hearing.

Inability to access even ordinary financial and medical records needed to prove eligibility for public benefits is a large stumbling block for welfare clients in hearings.[113] Welfare clients bear the burden of documenting income, assets, family status, and medical need.[114] It is difficult for low-income clients to

present at the hearing, and also noting that expert witnesses often require a fee to appear at the hearing).

109. *See, e.g.*, A.M.L. v. Dep't of Health and Health Care Fin., 863 P.2d 44, 48 (Utah Ct. App. 1993) (holding that the opinion of a Medicaid recipient's treating physicians as to the medical necessity of breast reduction surgery must be given deference and cannot be overridden by agency experts without a "reasoned basis" for decision).

110. *See e.g.*, TENN. CODE ANN. § 71-5-144 (2004) (requiring, under the state's new definition of Medical Necessity, that Medicaid clients prove that the benefits of the requested service outweigh the medical risks based on "scientifically supported evidence"); WASH. ADMIN. CODE. 388-501-0165 (2005) (state Medicaid regulation requiring that patients prove the efficacy of requested services with a "hierarchy of evidence" including controlled studies, "strong scientific literature", and "well-designed clinical trials").

111. *See generally* Jennifer K. Squillario, *Medicaid and Durable Medical Equipment: An Ongoing Battle Between Expense and Health*, 59 MD. L. REV. 669 (2000).

112. *Id.* at 692 ("The most glaring detriment of the standard is the burden it places on the Medicaid beneficiary to show, through statistical evidence, that the DME provides a benefit to the Medicaid population as a whole."). *See also Analysis of Proposed TennCare Definition of Medical Necessity* (2004), http://www.healthlaw.org/search/item.70582-Analysis_of_Proposed_ TennCare_ Definition_of_Medical_Necessity_June_04 (last visited Feb. 12, 2008) (arguing that the state's new definition of medical necessity creates "a nearly insurmountable burden for patients seeking care . . .").

113. *See* Lens, *Fair Hearing Room*, *supra* note 28, at 324–28 ("Documentation, or the reduction of every transaction into a written form that stands for the actual event, is the sine qua non of bureaucracies. Writings take on a rarified role in a bureaucracy. They are imbued with a misplaced objectivity and solidity. . . . Their existence puts [welfare appellants] at a distinct disadvantage. First, they must overcome this reification of documents, their status as unassailable fact. Then clients must be able to gather their own written and credible version of events . . . . Despite their efforts, clients, unlike workers, are not used to documenting every interaction. They also have less access to the types of proof that are valued.").

114. *See, e.g.*, 7 C.F.R. § 273.2(f)(5)(i) (2003) ("The household has primary responsibility for providing documentary evidence to support statements on the application and to resolve any questionable information.").

obtain the information they need to prove eligibility. They must be able to travel to banks, doctors' offices and former employers for records.[115] In addition, they may require computer access. Many appellants simply do not have the required level of sophistication to track down the information that they need.

Perhaps surprisingly, it is the government, not the low-income client, that has the best access to the appellant's own records, files, and evidence in a public assistance appeal. With release forms signed by the client, which are a condition precedent to receiving public benefits,[116] the state can electronically cross-check client bank records, real property, credit reports, debt, medical records, tax returns, and employment records.[117] Agencies have the power to subpoena medical and financial records[118] and can cross-check their computer records with those of the Internal Revenue Service, Social Security, and Employment Security.[119] The government, in sum, has the staff and resources to access these critical records.

The state is in a superior position relative to low-income appellants for another important reason: it writes the very rules that determine who gets benefits and who does not.[120] The state can also modify and clarify its rules if it believes that ALJs have misinterpreted them in granting eligibility. The ability to write and amend eligibility rules is advantageous to the state for more than just the obvious reason that the state can control the outcome via rulemaking. In contrast to the normal judicial process, in the administrative hearing process agency regulations are the primary source of law that must be applied by the hearing judge. Regulations take precedence over higher conflicting authority in statutes, case law, and even state and federal constitutions.[121] While agencies do

115. *See generally* WASH. ADMIN. CODE 388-490-0005 (2005) (listing the types of information applicants for cash, medical, or food programs must submit to verify eligibility).

116. Public assistance applicants and recipients must give the government free access to all medical and financial private records so that the agency can verify that the client is eligible for benefits. *See, e.g.*, WASH. ADMIN. CODE 388-490-0005(9) (2005).

117. Government welfare programs use computer matching as a check on clients' program eligibility. *See* U.S. GOV'T ACCOUNTING OFFICE, REP. NO. HEHS-00-119, BENEFIT AND LOAN PROGRAMS: IMPROVED DATA SHARING COULD ENHANCE PROGRAM INTEGRITY 25–30 (2000), *available at* http://www.gao.gov/archive/2000/he00119.pdf; WILLIAM S. BORDEN & ROBBI L. RUBEN-URM, U.S. DEP'T OF AGRIC., AN ASSESSMENT OF COMPUTER-MATCHING IN THE FOOD STAMP PROGRAM (2002).

118. 5 U.S.C. § 556(c)(2).

119. *See generally* Amy Mulzer, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 672–73 (2005) ("[there is an] increased use of 'computer-matching' as a primary means of verification. Instead of requesting paper documentation of income, or carrying out a home visit or collateral contact, workers using computer-matching check information reported in public and private databases.").

120. Agencies have broad authority under enabling legislation and under the statutes authorizing the various public assistance programs to write regulations setting out eligibility requirements. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

121. Iran Air v. Kugelman, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("Once an agency has ruled

not have the authority to promulgate regulations that violate statutory or constitutional mandates, it is hardly unprecedented for an agency to overreach in regulating, only to be found to have exceeded its authority by a reviewing court.[122] Such arguments will not, however, be countenanced by the hearing judge when raised by a public assistance appellant. This requirement that administrative judges treat agency-promulgated regulations, the lowest level of law, as the highest level of authority is unique to the public assistance hearing. In no other setting in American law are litigants essentially barred from enjoying the benefit of favorable statutes, case law and constitutions in making their arguments to the primary judge deciding their case.[123] Even assuming that an unrepresented person could figure out that a rule applied in terminating, reducing, or denying her public assistance was unconstitutional or violated the

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on a given matter, . . . it is not open to reargument by the administrative law judge; . . . although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions.") (citing Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12–13 (1973)). A number of states expressly incorporate such a rule into their statutes or regulations. *See, e.g.*, WASH. ADMIN. CODE § 388-02-0220 (2005) (stating that an ALJ must first apply the welfare agency's regulations and can only look to higher authority if there is no rule covering the issue); 1 TEXAS ADMIN. CODE § 357.483(d) (2007) ("The judge has no authority to declare state statutes or rules, or federal statutes or regulations, invalid"); CAL. GOV'T CODE § 11340.1 ("It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations."); 10 COLO. CODE REGS. §§ 2505-10-8.057.8.D–2505-10-8.057.8E (stating that ALJs are bound by agency regulations and shall have no jurisdiction to determine the constitutionality or legality of regulations). The same is true for federal agency judges. *See, e.g.*, Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 789 (D.C. Cir. 1987) (holding that if the agency is bound by an interpretative rule or statement of policy, its ALJs should be bound as well).

122. *See, e.g.*, Ohlson v. Weil, 953 P.2d 939 (Colo. Ct. App. 1997) (holding that welfare agency's regulation denying coverage of a body brace violated Medicaid statute); Jenkins v. Washington State Dep't of Social and Health Servs.,157 P.3d 388 (2007) (holding that the agency's "shared living" regulation, which reduced Medicaid recipients' in home care hours because they lived with their care givers, violated the federal Medicaid Statute, so that agency exceeded its statutory authority when promulgating the regulation); Schott v. Olszewski, 401 F.3d 682, 688–89 (6th Cir. 2005) (finding state agency violated federal law when Medicaid did not reimburse recipient for medical expenses she paid out of pocket after she was wrongfully denied coverage); White v. Beal, 555 F.2d 1146, 1151–52 (3d Cir. 1977) (finding state statute was illegal when it covered eyeglasses for those suffering from eye diseases but did not cover glasses for patients when refractive error caused poor eyesight).

123. *See, e.g.*, Singh v. Reno, 182 F.3d 504 (7th Cir. 1999) (holding that administrative agencies lack the authority to deal with constitutional claims; the final say on constitutional matters rests with the courts); Hodel v. Aguirre, 260 F. Supp. 2d 695 (N.D. Ill. 2003) (holding that administrative agency hearings lack the authority to deal dispositively with constitutional challenges); Modern, Inc. v. Florida Dep't of Transp., 381 F. Supp. 2d 1331 (M.D. Fla. 2004) (holding that under Florida law, where a litigant asserts that the agency applied a rule or statute in an unconstitutional manner, the litigant must raise its claims on review in the district court of appeal); Harrington v. Spokane County, 114 P.3d 1233, 1235 (Wash. App. Div. 2005) (holding that administrative agencies may not pass on the facial constitutionality of the statutes they administer). *See generally* Stuart Greer, *Expanding the Judicial Power of the Administrative Law Judge to Establish Efficiency and Fairness in Administrative Adjudication*, 27 U. RICH. L. REV. 103, 104 n.5, 7 & 105 n.8 (1992).

agency's authorizing statute, she could not successfully make that challenge at the administrative level.

The only way a public assistance appellant can challenge an illegal regulation is by appealing her case all the way through the administrative process up to the court system, and there arguing the issue. But as discussed above, most public assistance clients never get beyond the hearing itself in challenging the agency decision. The administrative hearing is, in practice, the only place of redress for these clients.[124] Even if the unrepresented client can identify a non-administrative legal issue and navigate the hearing process, which assumes a great deal, she will never get the chance to present it. Therefore, the ALJ's inability to overturn an illegal rule or to use higher authority in making a legal determination prevents public assistance appellants from getting a fair day in court.

The culture that permeates administrative agencies and influences their employees—including, most significantly, ALJs—further disadvantages welfare clients. ALJs have numerous incentives to affirm the state's position denying eligibility.[125] They are not truly independent in the way that judicial branch judges are in making their decisions for state and federal agencies.[126]

Perhaps the most palpable indication of agency power over the ALJ decision–making process is the employment relationship of the ALJ to the agency. In the federal system[127] and in almost half of all state hearing systems,[128] the ALJ is directly employed by the very agency whose decision is

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124. *See infra* Part I.C.

125. *See generally* Lens, *Fair Hearing Room*, *supra* note 28, at 322 ("[Welfare] clients were often suspicious of the state hearing officer, viewing him or her as an adversary or not neutral. What they observed in the hearing room further enforced the view . . . [Appellants] picked up on the easy familiarity between the hearing officer and agency representative when [they] walked into the hearing room . . . .").

126. According to Professor Daye's empirical analysis of ALJ decisions and judicial review in North Carolina prior to the 2000 amendments to its Administrative Procedures Act, individuals did not generally succeed in administrative adjudications. Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1629 (2001). This conclusion is based upon the fact that 76% of the 3,470 administrative hearings conducted by the Office of Administrative Hearings in North Carolina from 1985 through 1999 favored the agencies involved. *Id.* at 1615. Thus, when the public participates in the administrative adjudication process it only succeeds against agencies 24% of the time. *Id. But see* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. Rev 1341, 1353 (1992) (arguing that federal ALJ in the Social Security Administration "acts independently in all significant respects during the course of the decision process, but once her decisions are made, they are not granted the respect of finality or even deference.").

127. SSI appeals are heard by administrative judges employed by the Social Security Administration. Proposals have been made to separate the administrative decision makers from the SSA. *See, e.g.*, Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefit Claims*, 23 J. NAT'L A. ADMIN. L. JUDGES 267, 269 (2003).

128. *See supra* note 63. *See also* April Rolen-Ogden, *When Administrative Law Judges Rule the World:* Wooley v. State Farm*—Does a Denial of Agency-Initiated Judicial Review of ALJ Final Orders Violate the Constitutional Doctrine of Separation of Powers?*, 66 LA. L. REV. 885,

being challenged by the low-income appellant. For example, Social Security Administration judges constitute the vast majority of all federal ALJs.[129] Their direct employer is the same agency that has determined that the appellant either is not eligible for or has been overpaid Social Security disability or retirement benefits, or that the termination of these critical benefits was appropriate. Yet the "independent"[130] decision maker who is hearing the appellant's case is paid by that agency, is housed in the agency, works directly with the agency's management and expert staff, and is supervised by agency employees.[131] Commenting upon the need for a central panel agency on the federal level, United States District Court Judge John L. Kane, Jr. said, "I think that having the agency or department that litigates before an administrative law judge exercise the power to appoint, promote or assign is the same as having the fox guard the hen house. Even the most benign fox can be expected to make supper every now and then."[132]

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890 (2006).

129. The Social Security Administration employs the highest number of ALJs of any agency in the country. *Administrative Law Judges at the Social Security Administration: Before the Subcomm. on Social Security of the H. Comm. On Ways & Means*, 110th Cong. (May 1, 2007) (statement of Linda M. Springer, Director, U.S. Office of Personnel Management) (testifying that "The most recent data available to [U.S. Office of Personnel Management] show there are over 1,400 ALJs serving in the Federal Government, 1,100 of whom work at [the Social Security Administration] with the remainder primarily at the Department of Health and Human Services, the Department of Labor, and the National Labor Relations Board."). In fiscal year 2005, these ALJs presided over 500,000 disability hearings. Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416, and 422).

130. *See* James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L.REV. 1191, 1192 (2006) ("Administrative judges have an important role to fill: they are meant to preside impartially over fair hearings that implement and administer agency policy. To perform this critical role in the most effective way, administrative judges are not to function in a judicially independent way. Instead, they must recognize that their role demands adherence to agency policy and goals.").

131. *See* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 673 (1992). Macey writes:

> Congress's ability to design and structure an agency will "hardwire" the agency to generate decisions that reflect the original understanding of the enacting coalition. Congress can set the jurisdictional parameters of an agency, thereby determining which interest groups will have access to the agency, and on what terms. In addition, Congress can affect the relative abilities of various interests to influence future legislative actions and control ex ante the outcomes generated by an administrative agency by controlling which industries and interests will be reflected in the agency's staffing decisions, by determining how "independent" the agency will be from Congress, and by strengthening certain interest groups relative to others.

*Id.* In the 1980s, Social Security ALJs who found too often in favor of people appealing the agency's denial of disability benefits were disciplined by the Social Security Administration for being too "pro-appellant." Ass'n of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132 (D.D.C., 1984). The Association of Administrative Law Judges sued the agency for this practice and lost. *Id.* at 1143.

132. John L. Kane, Jr., *Public Perceptions of Justice: Judicial Independence and Accountability*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 203, 207 (1997).

Even in central panel states, the administrative hearing office is still a state agency and is often funded by the very agencies whose decisions they are overseeing. For example, in several central panel states, the Office of Administrative Hearings is a "revolving fund"[133] agency that gets its funding for hearings directly from the welfare and other agencies for which they hold independent hearings.[134] Agency funding governs everything from the number of judges hearing cases to the amount of support staff to the type of computers, fax machines and furniture in its office.[135] ALJs are well aware of this funding relationship, and so it provides an additional inducement to err on the side of the agency, particularly when the appellant's legal position is not a clear-cut winner.[136]

In most central panel states, welfare agencies have the right to review the decisions made by the independent Office of Administrative Hearings ALJ.[137] Even though the central panel agency hears the case and takes the evidence, it issues only an "initial decision." That decision is then appealable back to the welfare agency by either party.[138] So even when appellants prevail before the

133. *See, e.g.*, TEXAS STATE OFFICE OF ADMINISTRATIVE HEARINGS, AGENCY STRATEGIC PLAN FOR THE FISCAL YEARS 2007–2011 PERIOD 12–13 (2006), *available at* http://www.soah.state.tx.us/AboutUs/StrtPlan/2007_2011/1_Strategic_Plan_CompDoc.pdf (funding gathered through revenue appropriations from agencies, state highway funds, one lump sum contract and hourly billing contracts with agencies); MN Office of Administrative Hearings, Administrative Hearings Agency Profile 1–2 (2006), *available at* http://www.budget.state.mn.us/budget/profiles/administrative_hearings_profile.pdf ("The Administrative Law Division . . . is funded by a special revenue revolving fund."); WASH. REV. CODE § 34.12.130 (2003) ("The administrative hearings revolving fund is hereby created in the state treasury for the purpose of centralized funding, accounting, and distribution of the actual costs of the services provided to agencies of the state government by the office of administrative hearings.").

134. *E.g.*, State of Washington Office of Admin. Hearings, Strategic Plan Fiscal Years 2007–2013 11 (2006), *available at* http://www.oah.wa.gov/2007-13StratPlan.pdf. *See generally* State of Minnesota, Admin. Hearings Agency Overview 2006–07 Biennial Budget 3 (2005) *available at* http://www.budget.state.mn.us/budget/operating/200607/gov_rec/administrative_hearings.pdf (describing governor's recommendation for an hourly rate change for the services of administrative law judges and staff attorneys).

135. *See* State of Washington Office of Admin. Hearings, *supra* note 134, at 11 ("Since OAH currently relies on receiving revenue from other state agencies that it rules for or against, public confidence in the agency's ability to rule impartially may be enhanced if it received direct appropriations of funding.").

136. As Chief ALJ for the Washington State Office of Administrative Hearings from 1996 to 1997, I saw directly the impact of agency funding on ALJ independence described here. The statistics on the win-lose percentages of public assistance appellants indicate that these incentives are real. *See supra* note 126.

137. Three of the twenty-six states with central panels have adopted some form of final agency decision making with the ALJ, without a higher level of agency review: Louisiana, South Carolina, and Washington State. LA. REV. STAT. ANN. § 49:992(B)(2) (2002) (stating that agency does not have power to override final ALJ decision); S.C. CODE ANN. § 1-23-610(A), (B) (2005) (providing for limited agency review only for agencies with boards or commissions, but not agencies with a single director); WASH. ADMIN. CODE § 388-02-0215(5) (2005) (making ALJ decisions final in certain public assistance cases).

138. *See, e.g.*, 26 N.C. ADMIN. CODE § 03 .0127(c)(9) (2006) (explaining how the welfare agency or benefits appellants can make an appeal back to the welfare agency after the ALJ

independent ALJ, the state can and frequently does appeal that decision back to itself for review. The agency can then easily overturn both the factual findings and the legal conclusions of the independent judge that first heard the case.[139] The agency review judge reviews de novo the legal conclusions of the ALJ[140] and gives little if any deference to the ALJ's factual findings.[141] As a result, even when the public assistance appellant prevails at the independent administrative hearing, the agency power to appeal that decision back to itself can make that win just a fleeting victory.[142]

It is impossible to overstate the psychological and practical advantages this review process bestows on the agency. Appellants find it wholly unjust and unfair that an agency can itself review the decision when it loses at an "independent" hearing.[143] Claimants in this situation may forego even

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decision); 1 TEXAS ADMIN. CODE § 357.497 (2007) (stating that ALJ's make "proposal for decision" appealable back to the welfare agency); WASH. ADMIN. CODE § 388-02-0215 (2005) (setting out when the ALJ makes the final agency decision and when there is instead a further appeal to the agency review judge).

139. *See, e.g.*, TEX. GOV'T CODE ANN. § 2001.058(e) (2000) (setting out the standards of review used by agency review judges); WASH. ADMIN. CODE 388-02-0600 (2005) (same). *But cf.* N.C. GEN. STAT. ANN. § 150B-34 (2000), (strengthening the ALJ decision by directing the final agency decision makers to adopt the decision unless it was "clearly contrary to the preponderance of the . . . evidence."). Some statutory changes increasing the decisional power of the independent ALJ have been made in response to the fact that the agency decision makers charged with reviewing the ALJ recommended decision "tended to reject unfavorable recommendations and reinstate the agency's position in the case." Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1640 (2001).

140. *See e.g.*, WASH. ADMIN. CODE § 388-02-0600(2)(c) (2005) (reviewing judge may change hearing decision if it contains errors of law).

141. Three states give some deference to an ALJ's factual findings and credibility determinations. In North Carolina, the agency must accept the ALJ's findings of fact unless clearly contrary to the preponderance of evidence. N.C. GEN. STAT. ANN § 150B-36(b) (2000). In Oregon, the agency may change ALJ's findings of fact only if not supported by a preponderance of the evidence. OR. REV. STAT. § 183.650(3) (2005). Finally, in Washington State, agency reviewers must give only very minimal deference to an ALJ's factual finding: merely "due regard to the presiding officer's opportunity to observe the witnesses." WASH. REV. CODE 34.05.464 (4) (2003). Client advocates were able to convince the welfare agency to adopt in regulation a higher standard of deference to an ALJ's factual findings in public assistance hearings. *See* WASH. ADMIN. CODE § 388-02-0600(2)(b) (2005) ("A review judge may only change the hearing decision if . . . the findings of fact are not supported by substantial evidence based on the entire record.").

142. For both Medicaid and TANF decisions, the largest areas of administrative appeals, federal law may discourage state welfare agencies from giving final decision making authority to an independent hearing office. *See generally* 42 C.F.R. § 431.10(e)(3) (2007) ("[T]hey must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency . . . ."); 45 C.F.R. 205.100(3) (2007) ("[They] must not have authority to review, change, or disapprove any administrative decision of the single State agency, or otherwise substitute their judgment for that of the agency . . . ."). *See also* Grier v. Goetz, 402 F. Supp. 2d 876, 930 (M.D. Tenn. 2005) (holding that the state of Tennessee violated federal rule when it entered into an agreement with Legal Services to give final decision making authority for Medicaid cases to Tennessee's central panel agency).

143. Dissatisfaction of appellants with this appeal process has been cited as one of the bases for limiting agency review of ALJ decisions in North Carolina and Oregon. David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for*

attempting to respond to an appeal by the agency if they feel there is little likelihood of a fair result.

Finally, some public assistance appellants are disadvantaged when they confront ALJs who hold a general bias against them because of their class, race, gender, disability or addiction.[144] As case law and scholarship have shown, some ALJs are prejudiced against welfare claimants and, because of that prejudice, routinely make discretionary credibility findings against them.[145] Such bias affecting the outcome of a case can be difficult for an unrepresented claimant to detect, let alone prove on review.[146] When an ALJ considers herself a protector of the treasury[147] rather than a fair adjudicator of the law and facts, the result is that the claimant must essentially prove every element of her case beyond a reasonable doubt in order to prevail.[148]

For these as well as other reasons,[149] the public assistance appellant faces an

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*Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219, 242 (2000) (agency review limited in Oregon); Mann, *supra* note 139, at 1645–46 (agency review limited in North Carolina). *But see* James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 432 (2005) (arguing that ALJ finality has significant disadvantages in terms of loss of political accountability for administrative decision making and reduced agency capacity to develop and implement a consistent regulatory scheme).

144. *See generally* Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769 (2005) (discussing bias by administrative law judges and possible remedies); Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995) (asserting that bias exists in administrative adjudication).

145. *See, e.g.*, Grant v. Sullivan, 720 F. Supp. 462, 463–64 (M.D. Pa. 1989), *rev'd sub nom.*, Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993), *remanded sub nom.* to Grant v. Comm'r, 111 F. Supp. 2d 556 (M.D. Pa. 2000) (plaintiff groups brought bias claims against ALJ, alleging that ALJ discriminated against disability claimants); Pronti v. Barnhart, 339 F. Supp. 2d 480 (W.D.N.Y. 2004) (same).

146. *See* Small v. Sullivan, 820 F. Supp. 1098, 1105–06 (S.D. Ill. 1992) (citing Kendrick v. Sullivan, 784 F. Supp. 94, 100 (S.D.N.Y. 1992)) (granting waiver of exhaustion requirement given the unreasonableness of expecting an unrepresented claimant to perceive and challenge ALJ's predisposition to bias against social security claimants); Grant v. Sullivan, 720 F. Supp. 462, 463–64 (M.D. Pa. 1989) (noting that previous claimants had raised similar bias claims against the ALJ but that the merit of those claims had not been addressed). *See also* Pronti, 339 F. Supp. 2d at 495 ("[The evidence of bias] was not available to plaintiff Pronti at the time of her . . . hearing before ALJ Russell . . . .").

147. *See, e.g.*, Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 782 n.76 (quoting a judge describing himself as the "guardian of the Social Security Trust Fund").

148. *See id.* at 783–84 (relating a plaintiff's allegations that an ALJ effectuates his bias against Social Security claimants by holding them to a higher standard of proof than that required by law).

149. For example, the rules of evidence are relaxed in administrative hearings. Under the Federal APA, all "reliable, probative, and substantial evidence" is admissible. 5 U.S.C. § 556(d) (2000). Hearsay is admissible if it is relevant and material and can alone support a factual finding if it is reliable and credible. 2 AM. JUR. 2D *Administrative Law* § 347 (2004). *See also* WASH. REV. CODE § 34.05.452 (2003) (stating that hearsay evidence is admissible if the presiding officer believes "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs"); MODEL STATE ADMIN. PROCEDURE ACT § 4-212(a) (1981) (stating that "evidence may not be excluded solely because it is hearsay"); William H. Kuehnle, *Standards*

extraordinarily daunting battle to prevail in the administrative hearing process. Although the burden of proof in these hearings is the "preponderance of the evidence" standard,[150] the burden in practice may be much higher, even at times requiring proof of eligibility beyond a reasonable doubt in order to win at hearing and avoid reversal. We must examine this process, which gives the state so much power and the appellant so little, to see if there are ways to make the procedure more fair and just. Otherwise, the very integrity of this justice system is at risk. Accordingly, I propose to balance out the power inequities by taking a radically different approach to the burden of proof in the administrative hearing setting.

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So far, I have demonstrated the high stakes in these hearings and the significant obstacles to a just result for low-income appellants. In Part II I lay out the current confused state of the law of burdens in public assistance hearings to set the stage for my proposal to clarify and simplify the burdens. Afterward, I propose a reassignment of the burdens of production and persuasion to the government in all needs-based assistance cases as the best solution to this inequitable hearing system.[151]

## II.
## THE BURDENS IN PUBLIC ASSISTANCE HEARINGS ARE INCONSISTENTLY AND UNFAIRLY APPLIED

There is widespread confusion over the precise meanings of the different burdens and standards of proof applied in civil and criminal cases as well as in the administrative forum. As Justice O'Conner recently noted, the term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," i.e., which party loses if the evidence is closely balanced, and the "burden of production," i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding.[152]

Legal commentators have long been critical of the incoherent treatment of

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*of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829 (2005) (providing an in-depth discussion of the relaxed standards of evidence in administrative proceedings). The relaxed evidentiary rules and admissibility of hearsay in public assistance hearings allow the state to admit all types of potentially damaging evidence against appellants that would never get in if the hearing were in the judicial branch.

150. In public assistance hearings, appellants generally carry the burden by a preponderance of the evidence. *See infra* Part II.

151. *See infra* Part III.

152. Schaffer v. Weast, 546 U.S. 49, 56 (2005) (citing 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 342 (5th ed. 1999)).

burdens by the courts.[153] This Part will demonstrate that the burdens in these administrative appeals are perhaps even more confused than in civil cases generally and that this confusion harms those in our country who are most at risk and least able to understand or meet these burdens.

Since public assistance hearings are the only realistic forum in which to contest denials of critical benefits, it is imperative that the inequities in the system be eliminated. In this Part, I first illustrate the generally confused state of burden setting in these hearings. Then, where possible, I attempt to clarify the assignment of burdens by describing their application both when a state or the federal APA alone governs the hearing process and when they do not singularly govern. Finally, I show that where there is clarity, the burden of proof is almost always placed on the public assistance appellant rather than on the government.

### *A. "Cooperative Federalism" and Confusion over Burdens of Proof*

In public assistance hearings, the burdens of production and persuasion either clearly favor the government, or are difficult to ascertain. This confusion is caused in great part by the complexity of the laws and regulations governing the administration of the various welfare programs. With the notable exception of the SSI program, which is both federally funded and administered under one national standard,[154] all the major needs-based public assistance programs are authorized by federal statute and administered by the individual states. This has been described by the courts as "cooperative federalism," whereby the federal government prescribes the broad perimeters of a program but leaves decisions about how to run it to the discretion of the states.[155] The Medicaid, TANF, and Food Stamp programs were each created by federal statute and are largely federally funded,[156] but they are differently administered in each of the fifty states.

None of these federal public assistance statutes assigns the burden of proof in hearings governing these programs. As a result, any one of a variety of sources of law might dictate the burden of proof—if it is explicitly assigned at all. If the state chooses to apply its own administrative procedure act ("APA") to

153. *See, e.g.*, Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U. L. REV. 892 (1982); Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); Neil S. Hecht & William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U. L. REV. 527 (1978); John E. Stumbo, *Presumptions—A View at Chaos*, 3 WASHBURN L.J. 182 (1964).

154. 42 U.S.C. §§ 1381–1385 (2000).

155. *See, e.g.*, Wisconsin Dep't of Health and Family Servs. v. Blumer, 534 U.S. 473, 495 (2002) (when interpreting statutes "designed to advance cooperative federalism[,] . . . we have not been reluctant to leave a range of permissible choices to the States").

156. The Food Stamp Program is entirely federally funded. 7 U.S.C. §§ 2011–2036 (2000). The Medicaid and TANF programs are funded approximately 50% by the federal government and 50% by the states. 42 U.S.C. § 1396 (2000); 42 U.S.C. § 601 (2000).

its welfare hearings, then the burden of proof will be found there.[157] Or the state may pass statutes or regulations specific to the state agency that governs the program or its hearings.[158] If neither of these sources provides clear authority, there may be cases in which ALJs or courts have tried to discern the burden.[159] It is no wonder, then, that the question of who bears the burden of proof in welfare cases often proves so difficult for judges and lawyers, let alone pro se appellants, to answer.

In hearings governed by a state or the federal APA, there is some clarity about who bears the burden of proof, and I will next discuss the current state of the law in these instances. Then I will explore the confusion that emerges when an APA does not clearly apply or is overridden by another statute or regulation, or when the courts are left to sort out the issue.

### *B. The Burden of Proof in APA-Governed Hearings*

If a state or federal administrative procedure act applies to particular welfare hearings, that statute generally sets out who has the burden of proof, though it can be superseded by a more specific statute or regulation. The APAs on both the federal[160] and state[161] levels require that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[162] The proponent of a rule or order is the person who brings forward a matter for litigation or action, the moving party, or the party asserting the affirmative of a fact or issue.[163] Therefore, the proponent is virtually always the person

157. *See, e.g.*, COLO. REV. STAT. § 24-4-102(3) (2007) (applying Colorado's Administrative Procedures Act to virtually all state agencies, including the public assistance agencies and the Office of Administrative Courts); COLO. REV. STAT. § 24-4-105(7) (2007) ("Except as otherwise provided by statute, the proponent of an order shall have the burden of proof"); WASH. REV. CODE § 34.05.570(1) (2003) (except to extent provided otherwise by another statute, the burden of demonstrating the invalidity of agency action is on the party asserting invalidity).

158. *See, e.g.*, MINN. STAT. ANN. § 256.045 (2007) (governing administrative hearing procedures on human services cases); Ohlson v. Weil, 953 P.2d 939 (Colo. Ct. App. 1997) (holding that state Medicaid agency bears the burden by a preponderance of the evidence to establish the basis of the ruling being appealed, pursuant to its own regulation, Department of Social Services Regulation No. 8.058.54, 10 CODE COLO. REGS. 2505-10); WASH. REV. CODE § 74.08.080(2)(g) (2003) (assigning the burden of proof in Medicaid transfer of assets cases to the welfare agency by preponderance of the evidence).

159. *See* cases cited *infra* in Part II.C *infra* for examples of case law setting the burden.

160. 5 U.S.C § 556(d) (2000).

161. *See, e.g.*, WASH. REV. CODE §§ 34.05.001–34.05.903 (2003); CAL. GOV'T CODE §§ 11370-11370.5 (West 2007); OR. REV. STAT. § 183.310 (2005); COLO. REV. STAT. § 24-4-105(7) (2007).

162. *See* 5 U.S.C. § 556(d). *See also, e.g.*, WASH. REV. CODE § 34.05.570(1)(a) (2003) (stating that unless provided otherwise elsewhere in the code, the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity").

163. *See, e.g.*, Velasquez v. Dep't of Higher Educ., 93 P.3d 540, 542 (Colo. Ct. App. 2003); N. Cent. Good Samaritan Ctr. v. N.D. Dep't of Human Servs., 611 N.W.2d 141, 145 (N.D. 2000); Plummer v. District of Columbia Bd. of Funeral Dirs., 730 A.2d 159, 163 (D.C. 1999); Espinoza v. Dep't of Bus. and Prof'l Regulation, 739 So. 2d 1250, 1251 (Fla. Dist. Ct. App. 1999), *dismissed*,

challenging the agency action in the administrative hearing process, not the government agency.[164] This is true in all APA-governed agency hearings, whether the appellant is a business represented by a large law firm challenging the Environmental Protection Agency's promulgation of air quality rules or a pro se person with a mental disability appealing the Social Security Administration's denial of disability benefits. The APAs make no distinctions in burden allocation based on the likely sophistication of the appellant, the amount of power and resources she has relative to the agency, or the nature of the benefit being denied. In the welfare context, a public assistance appellant must prove that the state's action was invalid in both a termination, in which the agency has previously found the appellant to meet its eligibility requirements, and an initial denial of benefits.

The United States Supreme Court interpreted the federal APA provision that places the burden on the proponent of a rule or order in *Greenwich Collieries*,[165] which involved a review of a Department of Labor ("DOL") grant of Black Lung benefits to a miner.[166] The DOL had promulgated the "true doubt rule," which shifted the burden of persuasion to the party opposed to the benefits claim (typically the mining company).[167] Under the "true doubt rule," Black Lung Benefits Act ("BLBA") claimants who challenged a denial of this health benefit in an administrative hearing would win the claim when the evidence was evenly balanced.[168] A majority of the Supreme Court, however, found that this rule violated the burden of proof requirement in federal APA section 7(c), which places the burden of proof on the proponent of a rule or order—in this case, the benefits claimant.[169] It held that as used in the Act, the phrase "burden of proof" meant the burden of persuasion, not just, as the DOL had argued, the burden of production (i.e., the burden of going forward with evidence).[170] The DOL

761 So. 2d 328 (Fla. 2000); 2 AM. JUR. 2D *Administrative Law* § 354 (2004).

164. *See, e.g.*, Dir., Office of Workers' Comp., Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 270–71 (1994); Hazardous Waste Treatment Council v. U.S. EPA, 886 F.2d 355, 366 (D.C. Cir. 1989). *But see* Newport News Shipbuilding and Dry Dock Co. v. Loxley, 934 F.2d 511, 523 (4th Cir. 1991) (maintaining that the burden of proof properly belonged to physician who sought an order compelling full payment, even where the employer requested the hearing). *See also* 2 AM. JUR. 2ND *Administrative Law* § 355 (2004).

165. *Greenwich Collieries*, 512 U.S. at 269–76.

166. *Id.* at 269–70.

167. *Id.* at 269. The "true doubt rule" took a step towards the position I advocate in this Article.

168. *Id.*

169. *Id.* at 269.

170. *Id.* at 272–82. Prior to the Court's decision, the burden of proof requirement under the APA had been interpreted to mean only the burden of coming forward with evidence to support a claim, not the burden of persuasion. *See, e.g.*, NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 404 n.7 (1983) (noting that Sec. 7(c) of the APA "determines only the burden of going forward, not the burden of persuasion"); Envtl. Def. Fund, Inc. v. EPA, 548 F.2d 998, 1013 (D.C. Cir. 1976) (Leventhal, J., supplemental opinion) ("the 'burden of proof' [Section 7(c)] casts upon the 'proponent' is the burden of coming forward with proof, and not the ultimate burden of persuasion").

accordingly did not have the latitude to reassign the burden of persuasion to the opposing party. The Supreme Court reasoned that the federal APA is "a statute designed to introduce greater uniformity of procedure and standardization of administrative practice among diverse agencies whose customs had departed widely from each other" and that this uniformity is compromised if agencies are free to create presumptions.[171] "Under § 7(c) . . . when the evidence is evenly balanced, the benefits claimant must lose."[172]

The *Greenwich Collieries* Court thus held, for the first time, that for agency hearings governed by the federal APA, agencies can bear the burdens of production and persuasion only if Congress amends programs' enabling statutes specifically to place them on the agencies.[173] Agencies administering a federal program whose governing statute explicitly incorporates the federal APA and its burden of proof provision can no longer shift the burden by promulgating regulations. Absent a statute firmly placing the burden on the government, public benefits recipients and applicants in federal APA-governed hearings must therefore prove their eligibility in every instance, despite Congress' intentions that the program be remedial and that the agency should resolve doubts about eligibility in favor of the benefits recipient.[174]

It would be possible for an administrative agency to reallocate the burden of proof in its hearings through its rulemaking authority if the statute authorizing the benefits program were silent as to who held the burden.[175] This avenue is open only when a benefits program's enabling statute either does not incorporate the APA's default provision concerning the burden of proof or when the statute expressly reserves to the administering agency the power to modify the APA's provisions via regulation. A regulatory allocation of the burden of proof to the government would still have to be consistent with the legislative intent behind the program.[176]

Individual state legislatures must decide whether their state APA default burden rule applies to joint federal-state public benefits programs administered by state welfare agencies—benefits such as Food Stamps, TANF, and

171. *Greenwich Collieries*, 512 U.S. at 280–81.

172. *Id.* at 281.

173. *Id.* at 280–81.

174. *See id.* at 296 (Souter, J., dissenting) (pointing out that Congress intended the Black Lung Benefits Act to be remedial in nature and doubts about eligibility to be resolved in favor of the coal miner).

175. Bunce v. Sec'y of State, 607 N.W.2d 372, 378 (Mich. Ct. App. 1999) ("an agency can reallocate the burden of proof, either by rule or agency procedure, when necessary and consistent with the legislative scheme"). *Cf.* Schaffer v. Weast, 546 U.S. 49 (2005) (leaving open the question of whether states, through statutes or regulations, may override the default rule that the burden falls on the party seeking relief).

176. *See Greenwich Collieries,* 512 U.S. at 271 ("[A]ssuming, *arguendo*, that the Department has the authority to displace § 7(c) through regulation—this ambiguous regulation does not overcome the presumption that these adjudications under the BLBA are subject to § 7(c)'s burden of proof provision.").

Medicaid.[177] In Washington State, for example, the legislature has chosen to apply its state APA to administrative hearings involving public assistance benefits,[178] but several other states have declined to take this approach.[179] Further, even if the state's default APA rule applies, it might still be possible for a state welfare agency to override that provision through regulation, since the *Greenwich Collieries* decision only applies to federal agency rules.[180] Even after *Greenwich Collieries*, then, several avenues for burden reallocation in state agency hearings remain open.

### *C. The Burden of Proof in Non-APA-Governed Public Assistance Hearings*

While there is relative clarity that welfare appellants carry the burden when their benefit program is covered by a federal or state APA default rule, that clarity dissipates when the default rule does not apply. In some cases, the statute that establishes a benefit program explicitly allocates burdens. I will examine one such instance: for those programs that require a disability test, the Social Security Act distributes the burdens of proof on the issue of whether or not a person is "disabled" enough to need assistance. Even when an enabling statute provides such guidance, however, areas of ambiguity can emerge, as has happened in the case of disproving disability when the agency seeks to terminate benefits. I will examine case law that addresses who carries the burden in an appeal of benefits termination for a person who is already enrolled in social security disability. In other types of welfare cases, where statutes and regulations provide little or no guidance, the case law's assignment of burdens is ambiguous and haphazard. I will show that in appeals involving financial eligibility for benefits, the cases that have addressed who carries the burden and at what level are all over the map.

#### *1. Burdens of Proof in Agency Determinations of Disability*

One prominent area where a statute provides specific guidance about the burden of proof is the determination of disability for purposes of initially qualifying for SSI or Medicaid benefits. As SSI and Medicaid are two of the largest benefits programs, the question of who carries the burden in these hearing processes has considerable implications. Title XVI of the Social Security Act ("Act") provides for payment of disability benefits to indigent persons under the

177. Significantly, the definition of "Agency" in the federal APA expressly refers to authorities of the government of the United States but not the individual states. 5 U.S.C. § 551(1) (2000). Therefore, state agency hearings on eligibility for benefits from joint federal-state programs are not governed by the federal APA or the ruling in *Greenwich Collieries*, which is an interpretation of that statute. *See Greenwich Collieries*, 512 U.S. at 281 ("the true doubt rule violates § 7(c) of the APA").

178. WASH. REV. CODE § 74.08.080(2) (2001).

179. *See, e.g.*, ALASKA STAT. § 44.62.330 (2006) (Administrative Procedures Act does not apply to public benefits hearings).

180. *See supra* note 177.

SSI program.[181] Under the Act, "disability" is defined as the "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."[182] The Act provides that an individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in 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.[183]

Once disability is established and the claimant also shows he or she is within the resource and income limitations of SSI,[184] the claimant receives benefits in the form of monthly income and health insurance.[185] If the Social Security Administration determines that the claimant does not qualify as "disabled" and, therefore, denies the benefits claim, the claimant can appeal.[186]

Proof of disability is difficult to establish and follows a sequential five step process.[187] Under this process, the applicant bears the burden of proving each of the first four points: (1) that she is out of work, (2) the severity of her impairments,[188] (3) that the disability will last for a year or more,[189] and (4) that the impairment prevents her from doing any work she has done in the past.[190]

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181. 42 U.S.C. § 1382 (2000).

182. Id. § 1382c(a)(3)(A).

183. Id. § 1382c(a)(3)(B).

184. In 2007, the SSI limits are $2,000 or less in savings and $623 per month in income for a single person. 20 C.F.R. § 416.1205 (2007) (resources); Understanding Supplemental Security Income, http://www.socialsecurity.gov/ssi/text-income-ussi.htm (last visited Feb. 18, 2008) (income).

185. 42 U.S.C. § 1381a (2000).

186. 20 C.F.R. §§ 416.1413–1479 (2007) (describing procedures).

187. 20 C.F.R. § 416.920 (2007).

188. 20 C.F.R. § 416.920(c) (2007). *See also* 20 C.F.R. § 416.912(a) (2007) ("In general, you have to prove to us that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairments.").

189. 20 C.F.R. § 416.905(a) (2007).

190. 20 C.F.R. § 416.960(b) (2007). *See also* Gray v. Heckler, 760 F.2d 369, 371 (1st Cir. 1985) ("It is well settled that a claimant seeking disability benefits has the initial burden of proving that her impairments prevent her from performing her former type of work."); Gonzalez Perez v. Sec'y of Health, Educ. & Welfare, 572 F.2d 886, 888 (1st Cir. 1978) (declining to remand even though there were no findings or analysis by the ALJ that related the claimant's psychological disorder to the capabilities necessary to perform her prior work on the ground that "a claimant must establish that he can no longer perform his prior vocation before the government is obligated to prove that alternative employment is available for a person in claimant's condition. It is not sufficient to assert some general, functional disability and then leave it to the government to present evidence as to the practical consequences of the disability in terms of the requirements of

Only after the applicant has proven each of these elements does the burden then shift to the government to show the fifth and last point, namely, that the claimant could perform some work that is available in the national economy.[191] Although the Supreme Court has said in dictum that the burden shift in step five includes both the availability of work in the national economy and the claimant's ability to perform the work,[192] federal circuit courts remain divided on the scope of the shifted burden.[193]

Some courts have held that unrepresented SSI applicants must put on all the

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the claimant's prior work. That is the claimant's responsibility."); Pelletier v. Sec'y of Health, Educ. & Welfare, 525 F.2d 158, 160 (1st Cir. 1975) (holding that "[the plaintiff] did not bear her burden of proving a disability").

191. 20 C.F.R. § 416.912(g) (2007) ("We [the SSA] must provide evidence about the existence of work in the national economy that you can do."). *See also* Lancellotta v. Sec'y of Health & Human Services, 806 F.2d 284, 284 (1st Cir. 1986) ("[T]he inquiry as to whether Lancellotta was disabled focused on whether there existed, in significant numbers, other jobs in the regional or national economy that he could nonetheless perform. The burden of showing the existence of other jobs was on the Secretary.") (citations and internal quotation marks omitted); Mimms v. Heckler, 750 F.2d 180, 185 (2d Cir. 1984) ("The burden of proving disability is on the claimant. However, once the claimant has established a prima facie case by proving that his impairment prevents his return to his prior employment, it then becomes incumbent upon the Secretary to show that there exists alternative substantial gainful work in the national economy which the claimant could perform, considering his physical capability, age, education, experience and training.") (citations omitted); Vazquez v. Sec'y of Health & Human Servs., 683 F.2d 1, 2 (1st Cir. 1982) ("It is well established that, in applying this statutory standard, the claimant has the burden of showing a disability serious enough to prevent him from working at his former jobs, at which point the burden shifts to the Secretary to show the existence of other jobs in the national economy that the claimant can nonetheless perform.").

192. Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987) ("It is true . . . that the Secretary bears the burden of proof at step five, which determines whether the claimant is able to perform work available in the national economy.").

193. *Compare* Mays v. Bowen, 837 F.2d 1362, 1364 (5th Cir. 1988) ("Once [the claimant] has shown that he is unable to perform his previous work and that his disability has lasted or may be expected to last at least twelve months, the burden shifts to the Secretary to show that there is other substantial gainful employment available that the claimant is capable of performing. . . . If the Secretary adequately points to potential alternative employment . . . the burden then shifts back to the claimant to prove that he is unable to perform the alternate work.") (citation omitted) *with* Cole v. Sec'y of Health & Human Servs., 820 F.2d 768, 776 (6th Cir. 1987) ("Since there is no other evidence in the record that would support a finding that plaintiff is capable of performing specific jobs in the economy, the Secretary has failed to carry his burden of proof and benefits should be awarded."), Shelman v. Heckler, 821 F.2d 316 (6th Cir. 1987) (remanding case with instructions to Secretary to award disability benefits), Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987) ("The claimant bears the burden of proving a disability within the meaning of the Social Security Act. However, once a showing is made of disability preventing the claimant from engaging in prior work activity, the burden shifts to the Secretary to show 'that the claimant retains the capacity to perform an alternative work activity and that this specific type of job exists in the national economy' If the Secretary does not meet this burden, the claimant is disabled for purposes of award of disability benefits.") (citation omitted), *and* Halvorsen v. Heckler, 743 F.2d 1221, 1225 (7th Cir. 1984) ("A claimant has the burden of proof to establish an inability to return to her past relevant work, while, if the claimant meets that burden, the Secretary then has the burden to prove that there is some other substantial gainful employment available that the claimant can perform.").

evidence available on the issue of disability; otherwise they lose the claim.[194] Other courts have placed a higher duty on the agency to develop the record at the hearing when an appellant appears pro se.[195] The latter courts have recognized the limited ability of appellants to make the case for disability without the assistance of counsel, and thus have placed a greater duty on the ALJ to make sure that the record is complete and that the government has provided the documentation necessary to adequately assess disability.

At least one court has distinguished between Social Security (a social insurance non-welfare program) and the needs-based SSI program when it comes to allocating the burden of proving disability. Although both Social Security and SSI have identical legal disability standards, the Third Circuit has held that if the ALJ in an SSI hearing believes that evidence of disability is inconclusive or unclear, it is the judge's responsibility to secure whatever evidence is needed to make a sound determination. The court stated, "The statutory language in Title II [SS] which places the burden of proof as to the medical basis of a finding of disability on the claimant at all times is simply not present in Title XVI [SSI]."[196] In the welfare program setting, the Third Circuit put the burden on the government to provide enough evidence to make a clear determination of eligibility and did not let the agency rest on its laurels when an unrepresented claimant is unable to put on enough evidence to prove disability.

*2. Burdens in Terminations of Benefits Cases*

Once a client has been found eligible for public benefits, one might think the burden of proof would shift to the government when it later attempts to terminate those benefits. Only the Ninth Circuit has followed that reasoning.[197] In *Patti v. Schweiker*, it held that once the Secretary has determined that a claimant is disabled, there is a presumption of continuing disability.[198] Therefore, benefits cannot be terminated unless the government shows that the appellant's condition

194. *See, e.g.*, Vazquez Vargas v. Sec'y of Health & Human Servs., 838 F.2d 6, 9 (1st Cir. 1988) (rejecting plaintiff's claim that ALJ failed in his duty to assist her as a pro se claimant when he declined to obtain further medical records after plaintiff had failed to provide him with information to help identify the relevant records); Ramirez v. Sec'y of Health, Educ. & Welfare, 528 F.2d 902, 903 (1st Cir. 1976) (per curiam) (holding that the lack of counsel will not furnish grounds for disturbing denial of benefits when the right to counsel was voluntarily waived, absent showing that claimant was in any way misled or that the hearing was in any way unfair).

195. *See, e.g.*, Evangelista v. Sec'y of Health & Human Servs., 826 F.2d 136, 142 (1st Cir. 1987) ("We have long recognized that social security proceedings are not strictly adversarial. Accordingly, we have made few bones about our insistence that the Secretary bear a responsibility for adequate development of the record in these cases. Understandably, this responsibility increases when the applicant is bereft of counsel.") (citations omitted); Livingston v. Califano, 614 F.2d 342, 345 (3d Cir. 1980) ("the ALJ should assume a more active role when the claimant is unrepresented and thus has a heightened duty of care and responsibility in such instances") (citing Dobrowolsky v. Califano, 606 F.2d 403, 407 (3d Cir. 1984)).

196. Ferguson v. Schweiker, 765 F.2d 31, 36 n.4 (3d Cir. 1985).

197. Patti v. Schweiker, 669 F.2d 582, 587 (9th Cir. 1982).

198. *Id.*

has substantially improved. In *Patti*, the court found itself "unable to discern any reason why the familiar principle that a condition, once proved to exist, is presumed to continue to exist, should not be applied when disability benefits are at stake."[199]

Other circuits, however, have come to the opposite conclusion, requiring claimants to re-prove their disability at a termination hearing even though the government has already found their condition to be disabling. So holding, the Sixth Circuit wrote:

> The burden of establishing continuing disability is on the appellant. . . .[T]he standards to be applied by the Court in reviewing a termination of benefits do not differ materially from those applied in reviewing a denial of benefits. . . . In a case in which benefits have been terminated, as in a case in which benefits have been denied, the burden of proving disability is on the claimant, not on the Secretary.[200]

Thus the allocation of the burden of proof in termination of disability bases can be shifted by the federal court of appeals. The unsettled state of the law in this area does suggest that some courts are recognizing the policy considerations that weigh in favor of placing the burden on the agency when substantial benefits are on the line. It also hints at the ambiguity that persists outside of the disability context, where federal courts of appeals have not yet weighed in and might come down on either side of the issue.

So despite the myriad cases, statutes, and regulations discussing the burden of proof on the sole issue of disability for SSI and Medicaid eligibility cases, it can still be difficult to ascertain where the burden lies in these appeals. The issue of who bears the burden of proof can depend on the circuit in which the appellant resides or on the particular ALJ hearing the case.

*3. Burdens in Financial Eligibility Cases*

In cases where an agency denies, reduces, or terminates TANF, Medicaid, Food Stamps, or SSI benefits based on financial ineligibility, family composition, lack of medical necessity, or failure to participate in a job search, the courts generally place the burden of disproving the agency's finding on the low-income appellant. But even here there are inconsistent decisions. Case law in this area is scarce; but some state courts have held that an applicant for or current recipient of benefits must prove each and every element of eligibility.

In an unpublished opinion involving continuing financial eligibility for Food Stamps, for example, the Washington Court of Appeals found that, even in a termination case, "[t]he party challenging the agency's decision bears the burden

199. *Id.*

200. Myers v. Richardson, 471 F.2d 1265, 1267–68 (6th Cir. 1972). *See also* Gist v. Sec'y of Health & Human Servs., 736 F.2d 352 (6th Cir. 1984) (finding that there is no presumption of ongoing disability solely based on a state agency's previous finding of disability).

of proving the decision is invalid."[201] In Alabama, the state appeals court held that their Medicaid agency's determination of ineligibility is given a "presumption of correctness."[202] Applicants for benefits have consistently been required by state courts both to come forward with all financial evidence regarding their eligibility and to prove they are within the eligibility requirements.[203] On the other hand, a few courts have found that the burden of proof shifts to the state to show ineligibility once an appellant puts on a prima facie case showing he or she meets the eligibility requirements of the program.[204]

In appeals of terminations from public assistance benefits that get all the way through the administrative process up to the courts, some state courts have held that, when terminating a recipient, the state bears the burden of proving that a recipient is no longer financially eligible.[205] One state court in Colorado, for

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201. Yurtis v. Dep't of Soc. & Health Servs., 110 Wash. App. 1060, (Wash. Ct. App. 2002) (citing the Washington APA's default rule in placing the burden of proof on the person challenging the agency decision). *See also* WASH. REV. CODE § 34.05.570 (2003).

202. Ala. Medicaid Agency v. Norred, 497 So.2d 176, 177 (Ala. Civ. App. 1986). This conclusion is warranted by the limited standard of review in the circuit court under the Alabama APA. *See* ALA. CODE § 41-22-20(k) (1993) (providing that, in the circuit court, "[t]he agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute").

203. *See, e.g.*, Williams v. Scott, 647 S.W.2d 115 (Ark. 1983) (holding that burden is on applicant for Medicaid benefits to prove eligibility to the satisfaction of the administrative agency; there is no burden on the agency to investigate applicant's claim and introduce rebutting proof); Fischer v. Dep't of Soc. & Rehab. Servs., 21 P.3d 509, 515 (Kan. 2001) (holding that determination of which party would bear burden of proof regarding classification of resources in connection with determination of Medicaid eligibility was a question of law, and Supreme Court's review was therefore unlimited); *In re* Welfare of Sayles, 407 N.W.2d 414 (Minn. App. 1987) (holding that Department of Human Service's rule providing that trust fund is subject to personal property limitations mandated under applicable state law unless it can be affirmatively demonstrated that such fund could not be made available to meet individual's medical needs placed burden of proof on recipient to demonstrate affirmatively that fund in question could not be made available); Jackson v. Dep't of Soc. Servs., 706 S.W.2d 611 (Mo. Ct. App. 1986) (holding that claimant who applied for medical assistance benefits had burden of proving her resources did not exceed $2,000); Wagner v. Sheridan County Soc. Servs. Bd., 518 N.W.2d 724 (N.D. 1994) (finding that Medicaid applicant had burden of presenting reliable information as to value of her assets for purposes of determining her eligibility for Medicaid benefits); Ptashkin *ex rel.* Fliegelman v. Dep't of Pub. Welfare, 731 A.2d 238, 241 (Pa. Commw. Ct. 1999) (holding that applicant fully bears burden of proving eligibility for medical assistance); Martin v. Dep't of Pub. Welfare, 514 A.2d 204, 209 (Pa. Commw. Ct. 1986) (finding that burden is on medical assistance applicants to determine their eligibility, but that applicants must be advised of all services and benefits).

204. *See, e.g.*, Salinas v. Canyon County, 786 P.2d 611, 614 (Idaho. Ct. App. 1990) (holding that once applicant presents at least prima facie showing of medical indigency, burden of proof shifts to board of county commissioners to rebut applicant's claims.); Johnson v. Dep't of Human Servs., 565 N.W.2d 453, 458 (Minn. Ct. App. 1997) (holding that the general rule applicable to civil cases that prima facie case shifts burden of going forward to opposing party applies to administrative proceeding to determine eligibility for medical assistance funds for health service).

205. Raitport v. New York City Dep't of Soc. Servs., 688 N.Y.S.2d 74, 76 (N.Y. App. Div. 1999) (interpreting New York's social services law to deem those properly receiving SSI as having

example, held that the burden switches to the state to prove ineligibility by a preponderance of the evidence once an applicant for benefits appeals to the judicial system after losing in the administrative hearing process.[206] At the same time, other courts have held that a current recipient must prove all elements of eligibility in court.[207]

Whether or not the correct allocation of the burden, to the extent that it is even articulated by the courts, is communicated to and correctly applied by the administrative hearing judge in a pro se client's case is questionable at best. It is my experience that the burden of proof is rarely discussed by ALJs in the administrative hearing, even in the rare instance when the client is represented. Given the varied and confusing decisions within the various state and federal courts[208] and the general paucity of law on the issue, it is time to provide a clearly articulated and consistent rule allocating the burden of proof. Given the critical nature of public assistance benefits to low-income families, the importance of the assignment of burden of proof to the outcome of cases, and the policy considerations that should inform burden setting,[209] the rule should favor public assistance applicants and recipients.

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met the eligibility criteria, so that the agency must show other ways to terminate). For example, in *Kegel v. State,* the Human Services Department sought to terminate a child's health care benefits on ground that the child was the beneficiary of a "Medicaid qualifying trust." Kegel v. State, 830 P.2d 563, 564 (N.M. Ct. App. 1992). The court held that the burden of proof was upon the Department to show that the child was no longer eligible for benefits by showing that the trust fund in question was a Medicaid qualifying trust and thus "available" income. *Id.* at 565. In *Dep't of Social Servs. v. Beckner*, the Department, acting as claimant against the estate of a Medicaid recipient, sued to recover a sum allegedly expended on the recipient's behalf. Dep't of Soc. Servs. v. Beckner, 813 S.W.2d 353, 354 (Mo. Ct. App. 1991). The court held that the Department had the burden of proof and the estate was not required to adduce evidence to defeat the claim. *Id.* at 355. Similarly, in *Simmons v. Van Alstyne*, the court held that the burden of proof when discontinuing Medicaid benefits is not on petitioner, but on the local agency in the first instance. Simmons v. Van Alstyne, 410 N.Y.S.2d 400, 403 (N.Y. App. Div. 1978). Finally, in *Balino v. Department of Health and Rehabilitative Services*, the court held that the burden of proof at a reclassification hearing was upon the Department of Health and Rehabilitative Services, not upon recipients of Medicaid benefits seeking continued assistance. Balino v. Dep't of Health & Rehab. Servs., 348 So.2d 349, 349 (Fla. Dist. App. Ct. 1977).

206. Ohlson v. Weil, 953 P.2d 939, 941 (Colo. Ct. App. 1997) (holding that on Medicaid applicant's appeal from adverse ruling by state Department of Health Care Policy and Financing, Department bears burden, by preponderance of evidence, to establish basis of ruling being appealed).

207. Jones v. Bureau of Tenncare, 94 S.W.3d 495 (Tenn. Ct. App. 2002) (holding that State Medicaid plan, TennCare, did not have the burden of establishing a change of circumstances before it could terminate coverage for home health services; its only burden was to establish that the services were not medically necessary).

208. Having a consistent burden of proof serves the function of reducing confusion in the court system. Without it, "the triers of fact might assign their own burden, substituting their own notion of equity and justice for those mandated by law." Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 246 (1987).

209. *See infra* Part III.C (discussing the policies behind burden assignment).

## III.
## A SOCIAL JUSTICE PROPOSAL TO STANDARDIZE THE BURDEN AND PLACE IT ON THE STATE

### *A. A "Clear and Convincing Evidence" Standard*

I propose that the crazy quilt of burdens in the public assistance arena be abandoned in favor of a clearly articulated burden in every case.[210] I would establish standardized burdens of production and persuasion that consistently favors benefits applicants and recipients in administrative hearings reviewing denials, terminations, and findings of overpayment of all needs-based public benefits. I base this proposal on the sound policy considerations that have, in other contexts, moved courts, legislatures, and agencies to deviate from the default rule of placing the burden on the moving party. This proposal is a simple and fair way of addressing the significant confusion and inequity in the administrative hearing system which can result in the wrongful loss of critical income, food, and medical benefits for the indigent.

I propose that when the government seeks to deny a public benefit, it must provide evidence demonstrating every element of the appellant's ineligibility for benefits. In other words, to prevail at hearing, the state would have to come forward with facts that prove that the claimant is not financially qualified for the benefit program, not medically in need of the service applied for, or had been overpaid benefits. Thus, an appellant could prevail at the hearing without putting on a case if the agency failed to meet its burden of coming forward with evidence to prove ineligibility.

I would first require that all public assistance applicants and recipients fully cooperate with the agency in obtaining all information necessary to establish eligibility or ineligibility for benefits or to maintain current benefits.[211]

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210. Commentators frequently complain about the haphazard development of the law on burdens and presumptions. For example, Judge Learned Hand complained, "Judges have mixed [the law of presumptions] up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't much care what it is." 18 A.L.I. PROC. 217–18 (1941), *quoted in* Neil S. Hecht & William M. Pinzler, *Rebutting Presumptions: Order out of Chaos*, 58 B.U. L. REV. 527, 527 (1978). *See also generally* Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427 (1993); G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 CREIGHTON L.REV. 383 (1992). The confusion and inconsistency in the definition and application of burdens is particularly harmful when applied to hearings deciding eligibility for critical needs benefits.

211. Public assistance applicants and recipients are currently required to cooperate fully in agency investigations of eligibility and continuing eligibility. *See, e.g.*, 20 C.F.R. § 416.200 (2007) (requiring applicants as well as recipients of SSI to "give [the agency] any information we request and show [the agency] necessary documents or other evidence to prove that you meet [eligibility] requirements"); 20 C.F.R. § 416.912 (2007) (requiring applicants to prove eligibility by providing necessary "evidence" for the agency to reach conclusion regarding disability); 20 C.F.R § 416.916 (2007) (requiring applicants and recipients to co-operate in furnishing evidence of disability; failure to co-operate results in agency rendering decision based on information

Appellants, on the other hand, would only be required to provide the agency with *access* to this information, not to directly provide the evidence. Appellants would have to sign all necessary releases of information so that the agency can obtain medical and financial information from banks, doctors, employers, and so on. They would also be required to inform the agency of the location of their assets and income, the identities of their relevant medical providers and employers, and the identities of the people and agencies having information that can help establish whether or not they meet eligibility criteria. The applicant's full cooperation in providing the agency with access to necessary information is essential, but once given, the burden of tracking down and presenting this evidence would be on the agency, not on the low income client.[212]

I would further require that the agency meet a different and higher level of proof than is currently the standard in public assistance hearings. The traditional requirement is a "preponderance of the evidence" standard;[213] I propose that the state be obligated to prove ineligibility by the intermediate standard of "clear and convincing evidence."[214] Under a clear and convincing evidence requirement, the state would have the burden of proving all of the critical elements of its case by substantially more than 51% of the evidence.[215] As a result, only those who are clearly ineligible for benefits would lose them.

This proposal for a clear and convincing evidence standard in the administrative hearing setting is not unprecedented. While the general standard of proof in administrative law cases is preponderance of the evidence, there are exceptions to this rule when important, vulnerable interests are at stake. For example, the intermediate "clear, unequivocal, and convincing evidence" test was required by the U.S. Supreme Court in deportation hearings where a resident of the United States faced the possibility of being forced to leave the country.

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available); 20 C.F.R. § 416.918 (2007) (requiring applicants and recipients to participate in examination or test to determine disability); WASH. REV. CODE § 74.04.300 (2001) (requiring recipients of benefits to notify the department of changes that would result in ineligibility for benefits).

212. If the public benefits appellant failed cooperate in the agency's information gathering by failing to sign releases, to identify witnesses or medical providers, or to submit to examinations, then he or she would lose the benefit of the shifted burden.

213. *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 102 (1981) (holding that the standard of proof in APA hearings is preponderance of the evidence); California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 (1981) (preponderance of the evidence is the standard employed in most civil cases); J.H. WIGMORE, WIGMORE ON EVIDENCE § 2498 (4th ed. 1995).

214. There are generally three standards of proof: preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. The level of proof relates to how much confidence the fact finder should have in the factual findings. For an example of an argument for imposing a higher burden based on the import of the decision and the values involved, see Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?* 82 NW. U.L. REV. 492 (1988) (arguing that in academic freedom cases a simplified and uniform approach to burden shifting is required and proposing that, for policy reasons, the burden of proof should shift to the university and the standard be elevated to "clear and convincing evidence" on the issue of motive for firing a professor).

215. *See, e.g.*, Masaki v. Gen. Motors Corp., 780 P.2d 566, 574–75 (Haw. 1989).

The stakes were deemed so high for the resident that the Court required that the government prove its case at the higher standard.[216] The intermediate standard has been applied in other civil administrative settings when the potential losses for the appellant are immense, such as involuntary commitment[217] and expatriation cases.[218] Similarly, the courts have required the intermediate standard of proof when a person's livelihood is at stake in the proceedings, for example, in attorney disbarment cases.[219] This standard has also been applied against the Federal Communications Commission when it attempts to administratively revoke a person's broadcasting license.[220] As one commentator writes, "In situations when individuals stand to suffer serious liabilities as a consequence of administrative action, justice may be served by demanding increased procedural protections."[221]

The Supreme Court appears to agree with this assessment. When looking at the burden of proof that should be applied in civil commitment cases, it wrote:

> At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.[222]

The court contrasted this typical civil case with civil cases that fall closer to the criminal end of the spectrum, where the burden of proof is increased in order to reflect society's concern with potential deprivation of fundamental rights.[223]

The stakes are equally high for public assistance appellants. The consequences of losing safety-net benefits rival those of losing employment, reputation, and even liberty.[224] The same policy reasons articulated by courts

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216. Woodby v. INS, 385 U.S. 276, 277 (1966). *See also* Thomas v. Nicholson, 423 F.3d 1279, 1283 (Fed. Cir. 2005) (observing that the "clear and convincing" standard is "reserved to protect particularly important interests in a limited number of civil cases," such as deportation cases).

217. Addington v. Texas, 441 U.S. 418, 432–33 (1979).

218. Nishikawa v. Dulles, 356 U.S. 129, 133 (1958).

219. *See* David M. Appel, *Attorney Disbarment Proceedings and the Standard of Proof*, 24 HOFSTRA L. REV. 275, 284–85 (1995) (noting that New York is an exception to the majority rule that an intermediate standard of proof is appropriate for disbarment proceedings).

220. *See, e.g.*, Sea Island Broad. Corp. v. FCC, 627 F.2d 240, 244 (D.C. Cir. 1980) (holding that revocation of an FCC broadcasting license is governed, at the agency level, by the "clear and convincing" standard of proof, where a loss of livelihood results).

221. Louis L. Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 919 (1966).

222. *Addington*, 441 U.S. at 423.

223. *Id.* at 423–24.

224. One could argue that the deprivation of income, food, and health benefits resulting from a denial or termination of public assistance rivals the devastation a criminal defendant faces. Compare the typical criminal misdemeanor case with that of a denial of medical or income benefits. A criminal defendant charged with shoplifting, for example, is likely to suffer minimal consequences if convicted. *Cf.* 21 AM. JUR. 2D *Criminal Law* § 28 (1998) (noting that when it is the defendant's first offense, many jurisdictions will charge as a misdemeanor a crime that could

and commentators for applying the intermediate standard of proof therefore apply with equal vigor to public benefits hearings. The government and the public assistance appellant should not share the risk of error equally when a loss of benefits could result in hunger, homelessness, ill health, or even death for the appellant.

My proposal to change the burden of proof in public assistance hearings is justified according to the traditional theoretical underpinnings of burden assignment.[225] In the next section I will describe the policies advanced by assigning the burdens of production and persuasion to one party over another. I will then show how the consistent placement of these burdens on the government in public assistance administrative hearings furthers these policy goals.

### *B. Policy Considerations Support Shifting the Burden of Proof to the State in All Public Assistance Hearings*

When legislatures and courts deviate from the standard rule that the moving party bears the burden of proof,[226] the reasoning, although not always clearly articulated, tends to center on the themes of procedural efficiency, allocation of the risk of an erroneous decision, and basic fairness.[227] These three fundamental policy goals demand that the burden be placed on the state in public assistance hearings: procedural efficiency is served by this change because the state has the better access to the information and facts in the hearing; a sensible assessment of risk allocation reveals that the state is in the best position to bear the risk of loss

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be charged as a felony). Generally, little or no jail time is at stake. The likelihood is that the crime is not prosecuted at all but rather referred to a pre-trial diversion program. *See* Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 NEW ENG. L. REV. 495, 502 (1997). Even with minimal incarceration, some would argue that the criminal defendant is better off as she is provided with food, shelter, clothing, and basic healthcare benefits. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (stating that prisoners have a right to "adequate food, clothing, shelter, and medical care"). On the other hand, the denied public assistance applicant loses these basic needs when the state determines ineligibility. *See also supra* Part I.A.

225. In addition to the difficulties that public assistance appellants have in meeting their burdens of proof, they also face obstacles in convincing judges to adopt their interpretations of governing statutes and regulations. Agencies' interpretations of their enabling statutes are generally given deference by reviewing courts, agency representatives are well versed in the law and standard interpretations, and agencies have control over the regulatory process. I propose that when a rule at issue in a welfare hearing is not clearly drafted, judges be required to interpret the vague language against the drafter and in favor of the appellant. This rule would force agencies to be more careful in their drafting and provide another mechanism for balancing power in administrative hearing settings. I hope to explore this idea more fully in the future.

226. MCCORMICK, *supra* note 152, § 337 at 412 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.").

227. Section 337 of *McCormick on Evidence* points out that "there is no key principle governing the apportionment of the burdens of proof." MCCORMICK, *supra* note 152, at 415. Similarly, section 2486 of *Wigmore on Evidence* states that "[t]he truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." WIGMORE, *supra* note 152, at 291.

if the wrong decision is made; and fairness concerns dictate that the balance of power that favors the state should be leveled.[228]

As we have seen, most courts have historically been satisfied with allocating the burden of proof based on the "long-established procedural rule that he who asserts the affirmative of an issue has the burden of proving it."[229] This default rule derives from the notion that the argument for maintaining the status quo is presumed to be legally superior to one that advocates change.[230] While the default rule reflects sound policy in certain contexts—for example, the presumption of constitutionality afforded to statutes[231]—courts in public benefits hearings often follow the default rule without assessing whether or not it makes policy sense in that context. A proper analysis reveals that it does not.

First, it is procedurally efficient to assign the burdens of proof to the agency in public benefits hearings.[232] Generally speaking, the theory of procedural efficiency holds that the party with the best access to relevant information can most efficiently bear the burdens of proof related to that information.[233] Therefore, unless justice demands otherwise, courts generally allocate the burden of proof to the party with superior access to information.[234]

In the administrative hearing setting, it would be most efficient to place the burden of production on the state or federal agency because it almost always has far better access to information than public assistance appellants.[235] Appellants

228. *See generally* JULIANE KOKOTT, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL LAW: CIVIL AND COMMON LAW APPROACHES WITH SPECIAL REFERENCE TO THE AMERICAN AND GERMAN LEGAL SYSTEMS (Peter Malanczuk, ed., Kluwer Law International 1998); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11–13 (1959) (referring to fairness, policy, and probability).

229. Coy v. Superior Court of Contra Costa County, 373 P.2d 457, 462 (Cal. 1962). This concept is expressed by the legal maxims "*actori incumbit onus probandi*" and "*ei incumbit probatio qui dicit, non qui negat.*" KOKOTT, *supra* note 228, at 149.

230. *See* MCCORMICK, *supra* note 152, § 336 at 410.

231. Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982) ("Every statute is presumed constitutional unless proven beyond a reasonable doubt to be constitutionally invalid."). The presumption of constitutionality effectively operates to assign the burden to the party challenging the constitutionality of a statute and is justified on the grounds that legislatures are more competent at fact-finding than are courts, and that law made by legislatures is clearer, more reliable, and more representative of the public interest than law made by judges. KOKOTT, *supra* note 228, at 42–51.

232. *See* MCCORMICK, *supra* note 152, § 337 at 413 ("where the facts with regard to an issue lie particularly in the knowledge of a party, that party has the burden of proving the issue").

233. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.8 (3d ed. 1985).

234. *Id.* However, procedural efficiency may not be so compelling that it will trump other competing policies. *See, e.g.*, KOKOTT, *supra* note 228, at 136. In cases of fraud, for example, plaintiffs are routinely required to prove facts about which they were misled in the fraudulent incident, even though that information could be more easily acquired by the alleged perpetrator of the fraud. JAMES & HAZARD, *supra* note 233, at 325. Furthermore, outside the context of administrative hearings, modern developments in discovery have rendered procedural efficiency a far less compelling justification for burden allocation: depositions and readily accessible public records afford the parties functionally equivalent access to evidence in most areas of litigation.

235. *See* Mulzer, *supra* note 119, at 696–98, wherein she describes the "harm-related costs"

lack access largely because discovery, which has equalized access to information in most areas of civil litigation,[236] is more limited in agency hearings procedure. Agency documents, files, and witnesses are therefore difficult for appellants to obtain. In addition, agencies have discretion to determine by rule whether or not discovery is permissible at all in the adjudicative proceeding, and the hearing officer can decide whether or not to permit depositions or other discovery methods in a particular case.[237]

Even if full discovery were permitted, unrepresented low-income litigants would still have only limited access to relevant information unless they were unusually legally sophisticated. Litigants may not know which of the documents and evidence in their own agency files are relevant to their case, so they may not understand what they should request. Welfare agencies often have volumes of files on a single client located in various parts of the agency. Knowing where to look and what to look for is the province of the experienced poverty law practitioner and is almost certainly beyond the skill set of a pro se client.[238]

In contrast, welfare agencies have ready access to all kinds of information about the clients, the benefits they want to receive, and the law covering the programs. Agencies can obtain public assistance recipients' tax filings, Social Security records, bank statements, health records, and work records with relative ease.[239] It is procedurally efficient to require that the government use its vast

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to claimants "in obtaining and presenting documents and attending appointments." She describes monetary costs of obtaining information, including additional childcare, transportation, copying, postage, and lost wages.

236. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (noting that in employment discrimination cases, "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims").

237. *See, e.g.*, 5 U.S.C. § 556(c)(4) (2000) ("Subject to published rules of the agency and within its powers, employees presiding at hearings may... take depositions or have depositions taken when the ends of justice would be served."); WASH. REV. CODE § 34.05.446(2)-(3) (2003) ("An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used. Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means.").

238. Even though a great deal of agency information is now available and transmittable via computers, the poor often have little access to computers, email, cell phones, and other technology that could help alleviate some of the barriers to providing and receiving information from agencies. *See* Access to Justice Technology Principles (Full Text & Comments), http://atjweb.org/principles/full-text (last visited Feb. 20, 2008) (adopted by the Washington State Supreme Court Dec. 3, 2004) (laying out principles for use of technologies to promote equal access to justice in the Washington State justice system); Donald J. Horowitz, *Technology, Values, and the Justice System: The Evolution of the Access to Justice Technology Bill of Rights*, 79 WASH. L. REV. 77, 80–84 (2004) (describing the development of Washington State's Technology Bill of Rights initiative and the benefits to low income and disabled residents). *See also* Julia Wentz, *Justice Requires Access to the Law*, 36 LOY. U. CHI. L.J. 641, 644 (2005) (discussing the inspiration and mission of Washington's Technology Bill of Rights).

239. *Cf.* Wentz, *supra* note 238, at 645 (detailing online accessibility of statutes, court decisions, administrative regulations, and government publications); John C. Reitz, *E-Government*,

information gathering resources to obtain and provide the evidence proving each element of eligibility in public assistance cases.

The second policy concern behind burden allocation entails an inquiry into who should bear the risk of losing. Because "[t]he burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side,"[240] courts and legislators decide which party, absent any evidence to the contrary, *ought* to win. Put another way, the question as to who should bear the burden of proof comes down to "a comparison of the social costs between two potentially wrong decisions."[241] The question is, given the interests at stake for each party, which party is placed most at risk if an incorrect decision is made in the case? Burden allocation is inherently based upon a value judgment about the relative merits of the two sides' positions.[242]

It is not merely the measure of proof required—be it a preponderance of the evidence or a clear and convincing evidence standard—that reflects the importance of the underlying right[243] or interest at stake. Rather, the interplay between the measure of proof and the allocation of the burden of proof indicates and, in many cases, helps to facilitate the law's preferred outcome. Ultimately, courts appear to be more willing to depart from the default rule of requiring the moving party to bear the burden of proving all affirmative allegations when that party's interests are highly valued by society.[244]

In public assistance hearings, the great importance of benefits to the health and welfare of the poor and vulnerable is indisputable. The very purpose of government poverty programs is to reduce hunger, institutionalization, and dependence.[245] As the outcome of the underlying benefits dispute is critical to survival, the applicant's interest surely meets the policy criterion that we remove the burden of proof from the moving party when an important right or interest is at stake.

When we compare the social costs that an incorrect hearing decision would impose on the government to those it would impose on a public assistance applicant, it becomes even more apparent that the risk of loss should be on the state. An erroneous decision against the agency generally means a loss of money

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54 AM. J. COMP. L. 733, 737 (2006) (describing the technological features of e-government, including online management of information collected by agencies).

240. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 358 (Rothman Reprints 1969) (1898). *See also In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) ("[T]he choice of the standard [of proof] for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.").

241. KOKOTT, *supra* note 228, at 63.

242. *See id.* at 20–27.

243. Here, I am using the term "right" in the sense of statutory, regulatory, or contract right to the benefit at issue, rather than a constitutional right or entitlement.

244. *See* KOKOTT, *supra* note 228, at 98.

245. *See supra* Part I.A.

to the state. The agency will be required to provide income, medical care, or food to a family that does not meet the very stringent financial or disability requirements of the program. However, the agency can act to avoid future incorrect hearing decisions by rewriting the regulations at issue to clarify eligibility or by working harder to obtain the factual evidence and financial records needed to meet its burden. On the other hand, an erroneous decision denying public benefits to people who are, in fact, legally entitled to the benefit can have devastating consequences. Unlike the government, benefits applicants have, practically speaking, no way of effectively correcting a wrong decision against them.[246]

A final policy motivating burden allocation is essentially fairness: given the relative power of the parties to the litigation, on which party is it most fair to place the burdens? The theory is that in order to make the litigation process fair, the burden should lie with the party that holds superior power in the proceeding. In some areas of law, courts have refused to accept the basic premise that the party making a claim or raising a defense bears the burden of proving it and have looked instead at what is the most fair allocation under the particular circumstances of the case.[247] For example, in the recent case *Schaffer v. Weast*, the Supreme Court considered which party should bear the burden of proof in an administrative hearing involving a denial of special education benefits: the disabled child challenging the denial of benefits or the school district defending its plan?[248] The majority held that, in the absence of statutory allocation of the burden, the default rule applies: the burden of persuasion in an administrative hearing challenging an Individual Education Plan ("IEP") falls on the party seeking relief (almost always the child challenging the plan).[249]

Justice Breyer, in his dissent, observed that given the three policy considerations behind burden allocation, there was a strong case that the school district, not the disabled child, should bear the burden. "[O]ne can reasonably argue . . . that, given the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information," he wrote, "the risk of nonpersuasion ought to fall upon the district."[250] These considerations apply with equal force to public assistance appellants. Just as special education benefits appellants do, public assistance appellants must deal with highly technical and difficult issues while contending against an agency with superior resources and access to information. And the subject matter in both cases is of great "human importance." For these same reasons, the risk of nonpersuasion ought to fall on the government in the

246. *See supra* Part I.B for reasons why appellants have limited appeal options from an administrative hearing decision.

247. *See, e.g.*, Schaffer v. Weast, 546 U.S. 49, 63 (2005) (Ginsburg, J., dissenting).

248. *Schaffer*, 546 U.S. at 51.

249. *Id.* at 56–62.

250. *Id.* at 69. Justice Breyer concluded that the statute had left the issue to the states to decide. *Id.*

public assistance context.

Even the reasoning behind Justice O'Connor's majority opinion supports the notion that the burden in public assistance cases should fall on the state. Justice O'Connor based her holding in significant part on the fact that the Individuals with Disabilities Act ("IDEA") affords appellant disabled children a particularly full panoply of procedural protections.[251] By contrast, most of those procedural protections are not available to public assistance appellants. Justice O'Connor went on to state that because these protections exist in an IDEA hearing, it is not *unfair* to place the burden on the appellant: "[Disabled children] are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."[252]

Public assistance appellants, by contrast, *are* left to challenge the government without a realistic opportunity to access the necessary evidence and without the firepower to match the state. They are not given the opportunity to look at the evidence in the same way a parent is in special education cases.[253] Furthermore, unlike welfare agencies,[254] school districts are required by IDEA to give the reasons behind disputed actions, details about the other options rejected by the individualized education program team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision.[255] Nor are public assistance agencies required to pay for an appellant's own independent experts if the appellant disagrees with an evaluation obtained by the agency, as they are in IDEA cases.[256]

Finally, Justice O'Connor states not only that the most important of IDEA's procedural protections is that parents may recover attorney's fees if they prevail at the hearing, but also that the purpose of this and other protections is to "ensure that the school bears no unique informational advantage" over the appellant.[257] The attorney's fees provision gives IDEA appellants two huge advantages: they can access attorney representation[258] and the significant financial risk of the fee

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251. *Id.* at 60–61. *See generally* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (2000), specifically *id.* § 1415 (regarding procedural safeguards). The procedural safeguards afforded by the IDEA include the requirement that the school district provide parents with detailed reasoning behind its decisions, including the other options considered and rejected, *id.* § 1415(c)(2)(B)(i)(I) (Supp. 2005); reasonable attorneys' fees covered when parents prevail at the administrative hearing, *id.* § 1415(i)(3)(B); and the right of parents to obtain an independent district paid expert evaluation of their child, *id.* § 1415(b)(1).

252. *Schaffer*, 546 U.S. at 61.

253. 20 U.S.C. § 1415(b)(1) (2000).

254. Public assistance applicants and recipients are entitled to reasonable notice of the agency decision and the reasons behind it, but not in any detail. 42 C.F.R. § 498.74 (2006); WASH. ADMIN. CODE 388-02-0515 (2005); *id.* 388-02-0520. Agency notices are often criticized as incomplete and incomprehensible.

255. 20 U.S.C. § 1415(c)(2)(B)(i)(I) (Supp. 2005).

256. *See* 34 C.F.R. § 300.502(b)(1) (2007) (IDEA provision giving parents a right to independent educational evaluation at public expense).

257. *Schaffer*, 546 U.S. at 61. *See also* 20 U.S.C. § 1415(i)(3)(B) (2000).

258. Jessica Butler-Arkow, *The Individuals with Disabilities Education Improvement Act of*

shifting provision encourages school districts to settle cases favorably when they are not confident they will prevail. Public assistance appellants do not share these two advantages. No state has an attorney's fee statute providing that the state pay appellants' fees if it loses at the administrative level.[259] As a result, appellants in this forum are almost entirely unrepresented, and the government has no incentive to settle cases where the facts or law may somewhat favor the appellant.

In *Schaffer*, Justice O'Connor held that it was fair to place the burden on the appellant in an IDEA hearing because IDEA affords appellants such procedural protections as attorney's fees if they prevail.[260] That same rationale leads to the opposite result in public assistance cases because public assistance appellants enjoy none of the advantages afforded to IDEA appellants. Applying the reasoning employed by Justice O'Connor, one concludes that the burdens in public assistance cases should be placed on the state.

There are other areas of administrative law where the burden of proof at the hearing level has been placed squarely on the government or its equivalent due to precisely the same policy considerations just described. For example, in the Black Lung cases, prior to *Greenwich Collieries*,[261] courts recognized the important judicial policy that "all doubtful questions are to be resolved in favor of the injured employee in order to place the burden of possible error on the employer who is better able to bear it."[262] Similarly, in veterans benefits cases, Congress has provided statutory protection for veterans who administratively appeal denials of claims for income and health benefits: "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of

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*2004: Shifting School Districts' Attorneys' Fees to Parents of Children with Disabilities and Counsel*, 42 WILLAMETTE L. REV. 527, 527 (2006).

259. Fees are sometimes available for appellants who prevail at the court level, but not at the administrative hearing. *See, e.g.*, WASH. REV. CODE § 74.08.080(3) (2001). Although claimants for SSI and Social Security benefits are permitted to have representation by counsel at their own expense, the Social Security Administration is not required to appoint an attorney to represent a claimant at government expense. Toledo v. Sec'y of Health, Educ. & Welfare, 435 F.2d 1297, 1297 (1st Cir. 1971). However, where an action involves complex legal and factual issues it has been suggested that courts consider appointing counsel for the claimant. Parshall v. Soc. Sec. Admin., Civ. A. No. 93-MC-441-SAC, 1993 WL 393742 (D. Kan. Sept. 8, 1993), *adhered to on reconsideration*, Civ. A. No. 93-4200-SAC, 1993 WL 463469 (D. Kan. Oct. 18, 1993); Cortez v. Sec'y, Dep't of Health & Human Servs., No. 88 Civ. 8497 (SWK), 1991 WL 2758 (S.D.N.Y. Jan. 9, 1991).

260. *Schaffer*, 546 U.S. at 61.

261. In *Greenwich Collieries*, the Supreme Court held that the APA default rule required that miners appealing denials of Black Lung benefits must carry the burden of proof in the administrative hearing. *See supra* notes 192–201 and accompanying text.

262. Bath Iron Works Corp. v. White, 584 F.2d 569, 574 (1st Cir. 1978). *See also* Jones v. Dir., Office of Workers' Comp. Programs, Dep't of Labor, 977 F.2d 1106, 1109 (7th Cir. 1992) (noting the true doubt rule "place[s] the burden of possible error on those best able to bear it," i.e., employers) (citing Noble Drilling Co. v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)).

the doubt to the claimant."[263]

Special education cases, where parents are challenging school district decisions on what educational services will be provided to their children with disabilities, are similar to veterans benefits, Black Lung, and public assistance appeals in their complexity and in the benefit's critical importance to the lives of recipients. In these cases, even after the *Schaffer* decision,[264] states are allowed to assign the burden in hearings to the school district.[265] Many states, after weighing the policy considerations, have chosen to require that the school district bear the burdens of production and persuasion in all special education administrative appeals.[266]

Even in some public assistance appeals, the state bears the burden of proof in the administrative hearing. For example, in Food Stamp hearings to determine if there has been an intentional program violation,[267] the government bears the burden of proof and must prove its case by clear and convincing evidence.[268] Some states have instituted similar safeguards to protect Medicaid applicants whose eligibility is in question because they allegedly gave away assets to meet the program's financial requirements:[269] the burden can be placed on the welfare agency in the hearing to prove by a preponderance of the evidence that the person knowingly and willingly transferred the resource at less than market value for the purpose of qualifying for the Medicaid benefit.[270]

The theories behind placing the burden on the state in all of these administrative and civil arenas fully support making the same change for welfare

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263. 38 U.S.C. § 5107(b) (2000). *See also* 38 C.F.R. § 3.102 (2007).

264. The majority in *Schaffer* left open the possibility that individual states could set the burden in special education administrative hearings differently than the default rule. 546 U.S. at 61–62 ("Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. . . . Because no such law or regulation exists in Maryland, we need not decide this issue today.").

265. A recent special education case, *Escambia County Board of Education v. Benton,* indicates that *Schaffer* would not bar states from assigning the burden of proof to school districts where the program statutes are silent. 406 F. Supp. 2d 1248, 1263 (S.D. Ala. 2005). Specifically, the Court in *Escambia County* found that *Schaffer* is the "default rule" in circumstances where no state rule purports to shift the burden to the school district. *Id.* However, in the present case, the court stated that the default rule was not applicable because the law at the time of the administrative decision placed the burden on the school districts. *Id.* at 1264.

266. *See, e.g.*, CONN. AGENCIES REGS. § 10-76h-14(a) (2005) (placing burden on school district); 14 DEL. C. § 3140 (1999) (same); W. VA. CODE R. § 126-16-8.1.11(c) (2005) (same); MINN. STAT. ANN. § 125A.091, subd. 16 (West Supp. 2005) (burden varies depending upon remedy sought); GA. COMP. R. & REGS. 160-4-7.18(1)(g)(8) (2002) (default rule places burden on moving party, but this allocation can be altered depending on remedy sought).

267. In an intentional program violation hearing, the agency is attempting to disqualify a Food Stamp recipient because it believes the household has intentionally given false information to the agency. *See* 7 U.S.C. § 2015(b) (2000); 7 C.F.R. § 273.16 (2007).

268. 7 C.F.R. § 273.16(e)(6) (2007).

269. *See* 42 U.S.C. § 1396p(c) (stipulating that benefits are to be denied in such cases without specifying the allocation of the burden of proof).

270. *See, e.g.*, WASH. REV. CODE 74.08.080(2)(g) (2001). Attorneys fees are also awarded at the administrative level to appellants who prevail in their appeals of the Medicaid penalty. *Id.*

appeals. A clear and convincing evidence standard in all cases involving needs-based public benefits will further the efficiency of the hearing process, properly allocate the risk of loss to the party best able to bear it, and improve the fairness of the process by having the government, which controls public assistance program eligibility, prove its case.

### *C. How to Make These Changes*

Advocates for shifting the burden of proof can reach this goal in several ways. The most comprehensive and effective way to eliminate confusion and create a national standard would be to lobby Congress to amend the specific welfare programs' enabling statutes. The Food Stamp Act and the SSI, Medicaid, and TANF sections of the Social Security Act would be changed to place the burden of proof, by clear and convincing evidence, on state and federal agencies in all needs-based entitlement and welfare reform programs that receive federal funds. With the exception of the SSI program, which is entirely federally funded and administered, each of these programs is created by federal law and administered by the states.[271] Therefore, Congress has the authority to institute a uniform burden allocation and an identical level of proof across all states, something it has not chosen to do to date.[272] One advantage of this approach is that all state and federal agencies regulating the TANF, SSI, Food Stamp, and Medicaid programs would have the same burden to develop evidence regarding eligibility and to respond to hearing decisions interpreting their regulations.

If Congress chooses not to act, the proposed change in the burdens of proof could also be implemented state-by-state by amending individual state administrative procedure acts to create an exception to the default rule that the burden is on the party challenging an agency's action.[273] This strategy would be appropriate in those states whose APAs are applicable to public assistance hearings and appeals.[274] The exception would apply only to applicants for and recipients of needs-based public assistance benefits. The current burdens would remain in place for all other programs that do not require a finding of financial need to be eligible. In addition, all state and federal agency statutes and regulations dealing with fair hearings involving eligibility for needs-based public assistance benefits could be amended to incorporate the new burdens of proof in needs-based programs, including all application, termination, and overpayment cases.

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271. *See supra* Part I.A for my discussion of the structure of the programs.

272. The lack of a standard burden assignment in federal law is in large part the reason for the confusion in burden assignment in public assistance hearings case law. *See id.*

273. *See, e.g.*, WASH. REV. CODE 34.05.570(1)(a) (2003).

274. *See supra* note 157 for a partial listing of such states.

### D. The Impact of Changing the Burden

What would the world of public benefits look like if we required the state and federal governments to show by clear and convincing evidence why the applicant or recipient does not meet the eligibility requirements? How would state and federal agencies be affected by this change? Would the floodgates open when all who applied won their benefits on appeal? Would state and federal budgets be overwhelmed because so many more people would be found eligible and so many more state workers would be required to document eligibility requirements?

The short answer is no.

First, while initially more appellants would likely be found eligible for benefits, particularly in close cases, it is doubtful that large numbers of factually ineligible clients would prevail. In the criminal system, even with the highest level of proof placed on the state—it has to prove its case beyond a reasonable doubt—and with a presumption of innocence,[275] the right to trial by jury,[276] and the right to legal counsel,[277] the vast majority of people charged with crimes by the state are convicted, either after a trial or through plea bargaining.[278] Similarly, public assistance agencies are unlikely to be faced with a glut of ineligible clients winning benefits.

It is, however, likely that under my proposed regime, more clients would win benefits in close cases. Still, the fiscal floodgates need not open: if the state found that too many people were winning at hearing, it could either tighten eligibility rules or improve the quality of the cases it presents at hearings. Either of these methods of allocating scarce resources and making public policy would be fairer and more appropriate than the current method: capitalizing on procedural advantages to cut off benefits to the most vulnerable members of our society, those who are least able to argue a case at hearing. To the extent that agencies did see more low-income appellants winning their benefits claims, the reasons would be that the evidence for ineligibility was not strong in these cases and that the appellants' arguments had merit. When the claimant is not clearly ineligible, it is appropriate to err on the side of eligibility for brutal needs benefits.

Second, agencies will actually function better in several ways if we place the burdens squarely on the state. Placing the burdens of proof and persuasion

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275. *E.g.*, WASH. REV. CODE 9A.04.100(1) (2000).

276. U.S. CONST. amend. VI.

277. Gideon v. Wainwright, 372 U.S. 335, 340, 344–45 (1963) (requiring publicly paid attorneys for criminal defendants who cannot afford to pay for their own).

278. In 2002, 68% of defendants in serious charges were convicted of the offense within one year. Of the 25% who were not convicted, 24% were dismissed without trial and only 1% were acquitted. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002 24 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf.

on the state forces it to do its homework and increases the quality of agency decision making. Instead of relying on the inability of its clients to play the hearing game, the state will actually have to prove every element of ineligibility in every case. As a result, the state will take greater care with each client's case, resulting in better-defended and -articulated eligibility decisions. And we should demand that agencies take great care when they determine a client's eligibility for life-saving benefits. Because those benefits can be so critical, it makes sense to require a higher level of proof as a sort of quality control over agency decisions. Furthermore, if agencies routinely take care with each client, clients may actually appeal denials less often because they will better understand exactly why their claims were denied.

Third, if the state developed better and more reliable information to prove its cases, then law-makers and agency managers would have more accurate statistics about who is and is not meeting eligibility requirements. At present, it is difficult to assemble statistics that reflect the actual level of need among agency clients because eligibility depends so heavily on the resourcefulness of each individual client.[279] Accurate numbers are important when policy and budget decisions are being made about who should be allowed these benefits. Policy makers should base their decisions not on the skill with which claimants can make their cases but rather on accurate eligibility figures generated by the agencies in charge of public assistance programs.

A recent action by the Washington State legislature puts an unexpected twist on this last theory and helps prove my point. During the 2003 session, in order to save state dollars during a tight budget year, the legislature changed the burden of proof in administrative hearings for clients who have been terminated from the GA-U benefit.[280] Whereas before, the agency had to prove that a change in a client's condition rendered him or her ineligible, now the "[Department of Social & Health Services will] discontinue benefits for General Assistance-Unemployable (GA-U) clients unless the client demonstrates that their medical or mental condition has not improved and they therefore still need a GAU cash grant and medical benefits."[281] It was estimated that the change

279. Ironically, persons who face the greatest need are often the least physically and mentally able to compile the financial and medical evidence they need to prove eligibility. *See supra* note 86.

280. Redefining Eligibility for General Assistance, 2003 Wash. Sess. Laws ch. 10, *available at* http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2252&year=2003 (amending WASH. REV. CODE 74.04.005(6)(g)). The GA-U program provides income and medical benefits to low income single people who are disabled, but do not qualify for Social Security or SSI. WASH. REV. CODE 74.04.005(6)(a) (2001). These clients are typically unmarried, have no children, and have shorter term mental and physical disabilities (lasting less than a year) preventing them from working.

281. Washington State Legislative Budget Notes, 2005-05 Biennium 253 (October 2003), *available at* http://leap.leg.wa.gov/leap/budget/lbns/2003dshs.pdf. *See also* WASH. ADMIN. CODE 388-448-0160(2) (2005) (implementing the General Assistance budget change by requiring that the recipient present additional medical evidence showing no material improvement in order to continue to be eligible for GA-U).

would lead to over seven million dollars in savings per year.

The legislature knew that many previously eligible clients would be unable to re-prove their eligibility. Thus, the legislature knew that those most in need but least capable of putting on a case would be cut from the program, not because they were no longer disabled or low-income, but because they would not have the skills to represent themselves in the process. It is cynical and unfair to cut a budget by making it more difficult for those already at a steep disadvantage to prove their eligibility. I am proposing the opposite—that we determine eligibility for benefits fairly and transparently and that we base policy decisions on real information about who is and is not sufficiently needy to receive benefits.

Fourth, requiring the state to prove its case in every instance will also result in agencies writing better and more clearly articulated regulations. Agency rules that were unclear would be interpreted against the drafter and in favor of eligibility.[282] In this way, agencies would be encouraged to identify and clarify ambiguous rules. Clients would benefit from consistent and reasonable interpretations of regulations and more easily understood eligibility requirements.

Finally, it is likely that agencies would settle more appeals of public assistance denials and terminations because in cases that are not clear-cut, the agencies would know they were less likely to prevail on appeal. More cases would also be settled by clients, who would have access to better written rules and better developed evidence. Placing the burden of proof on the state would allow for more efficient use of the administrative hearing system: there would be fewer hearings, more developed factual records and legal arguments, and more cases where there is a real dispute about the facts or the law.

I believe that the procedures in place in the administrative hearing process are inappropriately used by agencies to help balance budgets by filtering out a segment of public assistance applicants who are, in fact, eligible.[283] If the government wishes to limit access to brutal needs benefits, it should do it up front in its statutory and regulatory eligibility requirements, not at the back end by profiting from standards of proof that render the least capable and most needy unlikely to make their case. Government should make clear decisions about who is eligible for benefits and who is not, write unambiguous regulations setting out these resource allocation decisions, and amend those regulations when hearing decisions interpret them in ways not intended by the agency. In this way, agency regulations will more precisely reflect the actual intent of government.

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282. *Cf.* 17A AM. JUR. 2D *Contracts* § 343.

283. *See, e.g.*, Mulzer, *supra* note 119, at 690–94 (demonstrating that burdensome verification procedures result in the wrongful denial of needs-based benefits to actually eligible individuals: "Churning occurs when a claimant fails to receive benefits—or has her benefits terminated—for reasons that are 'wholly administrative' and therefore 'unrelated to the [claimant's] actual need for public assistance.'").

## CONCLUSION

The public assistance hearing system is the primary justice system for low-income citizens who challenge the government's denial of basic human needs benefits. In this system, the playing field is heavily biased against claimants. In my view, the most equitable and efficient way of leveling this field is a simple procedural device: allocating the burden of proof to the state and requiring that it prove its case by clear and convincing evidence. Placing the burdens of production and persuasion on the government in public benefits cases accomplishes a major step toward reasonably equal justice. This solution will more simply, fairly, and directly assist clients than providing access to counsel or relying on judges to raise relevant legal issues the parties have missed or to ask questions to determine the admissibility of evidence when a pro se appellant is unable to master the rules.[284]

It is time for advocates to call attention to the inequities in the public assistance administrative hearing system and to argue for changes that will make this process a real justice system for the poor. Requiring that the government prove every element of its case at the high standard of clear and convincing evidence will go a long way towards creating a system that meets this goal.

284. *See also* Cantrell, *supra* note 23, at 1574 (postulating that there are three possible ways to eradicate the problem of unequal access to legal representation of the poor in civil cases: provide more free attorneys for the poor; alter the legal process so that it is less dependent on attorneys; or alter low-income people's ability to navigate the system).