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Administrative Agencies and the Rites of Due Process: Alternatives To Excessive Litigation

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ADMINISTRATIVE AGENCIES AND THE RITES OF DUE PROCESS: ALTERNATIVES TO EXCESSIVE LITIGATION

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1. Introduction

In 1834, Alexis de Tocqueville wrote, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] The very first Congress, in 1789, took action to defend the governmental processes against American litigiousness by establishing an administrative agency to remove questions from the courts. In that year, Congress established the antecedent to the Veteran's Administration so that clerks, not highly-paid judges, would resolve the flood of questions concerning eligibility for veterans' benefits.[2]

The growth of courtroom of litigation far outpaced any efforts to contain it.[3] The adjudicative function of administrative agencies, however, also grew tremendously. One agency alone, the Social Security Administration, now holds approximately 80,000 hearings annually concerning disputed claims.[4]

As the role of administrative agencies grew, citizens needed more protection against potentially harmful governmental decisions.[5] As a result, in recent years courts have required agencies to apply due process of law before interfering with benefits to which citizens may be entitled.[6] Thus, citizens may press their claims in agency hearings, and may complain in court if the hearings do not provide adequate due process protection.

Litigation, particularly against the government, entails social

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1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Vintage trans. ed. 1945).
2. K. DAVIS, ADMINISTRATIVE LAW TEXT 6 (3d ed. 1972).
3. In the past seven years alone, there has been a 40% increase in federal civil and criminal filings. *Those #*@¢& Lawyers!*, TIME, April 10, 1978, at 59. Federal court filings rose from 93,047 in 1956 to 171,617 in 1976. *New York Times*, May 18, 1977, §A, at 1, col. 3.
4. B. SCHWARTZ, ADMINISTRATIVE LAW 28 (1976) [hereinafter cited as B. SCHWARTZ].
5. *See* text accompanying notes 9-16 *infra*.
6. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Bell v. Burson, 402 U.S. 535 (1971); California Human Resources Dep't v. Java, 402 U.S. 121 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); W.G. Cosby Transfer and Storage Corp. v. Froehlke, 480 F.2d 498 (4th Cir. 1973); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973); Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir. 1970).

costs. These include heavy economic burdens on all parties, long delays, and the sacrifice of other important goals and efficiencies.[7] To the extent that judicial protection of citizens' due process rights against the government produces litigation, a difficult conflict of values arises. This Article will describe that conflict and explore possible resolutions.

Part II will explain why it was necessary to expand due process protection against administrative agencies. Part III will examine the cost to society of certain extensions of due process procedures. Part IV will question the benefits derived from such extensions. Part V will suggest the propriety of certain reductions in the right of the individual to go to court for redress of administrative agency decisions. Part VI will review the balance among procedural due process and other values as well as propose the creation of an administrative board to eliminate excessive litigation in New York City Tax Certiorari proceedings.

II. Judicial Protection of Due Process Rights Against Administrative Agencies

The utilization of courts to solve a variety of problems is an American tradition. In recent years, the trend has been toward expanding the range of judicially enforceable rights. In an age when the power and role of government has expanded tremendously, the need to increase court protection afforded individuals against governmental abuses can readily be explained.[8]

A. The Need for Greater Protection of Individuals Against Government Agencies Prior to 1970

Flemming v. Nestor[9] provides a powerful illustration of the injustice which may arise when the courts do not provide protection for the individual commensurate with the expansion of the role of government. Because Mr. Nestor had been a member of the Communist Party from 1933 to 1939,[10] his wife was deprived of her right to

7. *See* text accompanying notes 26-61 *infra*.

8. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964), to which the author is indebted for much of the following discussion of the *Nestor* case.

9. 363 U.S. 603 (1960).

10. *Id.* at 605-06. Nestor's wife was deprived of benefits, otherwise due based on her husband's Social Security payments, because he had been deported under a statute which provided for the deportation of Communist party members. He was in fact deported due to his Communist party membership. Justice Harlan, writing for the Court, stated that the

benefits to which she should have been entitled based on her husband's Social Security payments from 1936 to 1955.

Of all forms of government benefits to individuals, the right to Social Security benefits is most clearly "a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead."[11] Under the law at that time, however, Nestor had no right to judicial protection for this entitlement. Nestor had no contractual or "accrued property right" to the Social Security annuity.[12]

Legal protection of various government benefits was limited. In *Wilkie v. O'Connor*,[13] the New York State Supreme Court refused to recognize the right of a welfare recipient to challenge the validity of a condition for eligibility. The court said bluntly, "in accepting charity, the appellant has consented to the provisions of the law under which charity is bestowed."[14]

Government bounty, a mere "privilege,"[15] could be conditioned on the government's terms. The recipient, if he failed to meet those conditions, had no standing to challenge their validity. Government employment, another mere privilege, could be conditioned on such terms as the government saw fit, without regard to other rights ordinarily enjoyed by the individual. In *McAuliffe v. Mayor of New Bedford*,[16] Judge (later Justice) Oliver Wendell Holmes wrote, for the majority, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[17] In short, the courts were loathe to interfere with governmental decisions to deprive individuals of its "bounty" of whatever kind and for whatever reason.

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deprivation of benefits was based on the fact that Mr. Nestor was deported, not on Mr. Nestor's party membership. *Id.* at 618-21. However, Justice Harlan did not dispute that the deportation was based on Mr. Nestor's Communist party membership. Justice Black argued forcefully in a dissent that Communist party membership was obviously the basis for the deprivation. *Id.* at 627 (Black, J., dissenting).

11. Reich, *The New Property*, 73 YALE L.J. 733, 769 (1964).
12. 363 U.S. at 608.
13. 261 A.D. 373, 25 N.Y.S. 2d 617 (4th Dep't 1941).
14. *Id.* at 375, 25 N.Y.S.2d at 620.
15. B. SCHWARTZ, *supra* note 4, at 219 and cases cited therein.
16. 155 Mass. 216 (1892).
17. *Id.* at 220.

B. The Expansion of Due Process Protection: The Right to a Hearing

Goldberg v. Kelly[18] marked a revolutionary change in this judicial attitude. In *Goldberg,* the Court held that due process requires a hearing before welfare payments to a recipient may be cut off for an alleged violation of a condition of eligibility. Justice Brennan, writing for the Court, stated, "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them."[19]

The significance of this decision can be appreciated in light of previous decisions such as *Nestor.* In that case, the recipient had no right to contest the withdrawal of a benefit to which the recipient had contributed for twenty years, and to which the recipient was clearly "entitled" by almost any conceivable standard. The court's traditional approach to recipients' attempts to contest withdrawal of welfare payments (to which recipients are less obviously "entitled") was simple; there is no right to welfare.[20]

The Court in *Goldberg v. Kelly* called welfare benefits an "entitlement," rather than a right. However, it gave that "entitlement" the judicial protection customarily awarded to a right.[21] *Goldberg v. Kelly* had wide-ranging ramifications. It was followed by decisions providing judicial protection, in varying degrees to government employment,[22] unemployment benefits,[23] public housing,[24] licenses,[25] even government contracts.[26]

The individual had hitherto lacked commensurate protection from arbitrary denial by the government of benefits which replaced private sector opportunities, sometimes replacing them forcibly, as in Nestor's compulsory social security payments. Through the *Goldberg v. Kelly* revolution, the range of judicial protection was expanded to cover many of the new areas in which government had acquired power since the New Deal.

Thus, the American tradition of litigiousness was given new and

18. 397 U.S. 254 (1970).
19. *Id.* at 262.
20. Smith v. Board of Comm'rs, 259 F. Supp. 423 (D.D.C. 1966), *aff'd,* 380 F.2d 632 (D.C. Cir. 1967).
21. 397 U.S. at 262.
22. Perry v. Sindermann, 408 U.S. 593 (1972).
23. California Human Resources Dep't v. Java, 402 U.S. 121 (1971).
24. Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir. 1970).
25. Bell v. Burson, 402 U.S. 535 (1971).
26. W.G. Cosby Transfer and Storage Corp. v. Froehlke, 480 F.2d 498 (4th Cir. 1973).

broader scope. Areas of life were made subject to determinations based on due process considerations in ever increasing measure. Armed with newly acquired judicial "entitlements" to government benefits, plaintiffs thrust greater responsibility on the judicial and quasi-judicial agency processes which distribute the offerings of the economy.

III. The Danger of Over-Judicialization

Excessive preoccupation with due process has resulted in its expansion at the cost of other equally important values. The government's vulnerability to legal attack has brought about significant financial and social costs. Illustrative examples include school discipline cases, welfare fraud investigations, and economic distribution functions.

A. School Discipline Cases

The application of due process requirements to school suspension cases has changed the relationship between schools and students. Public, impersonal, formal proceedings have been substituted for private, personal, and informal processes traditionally used to resolve school discipline problems. Procedural fairness may have been improved at the expense of privacy, morale, and efficiency.

In *Goss v. Lopez*,[27] Justice White wrote for the Court that public school students have a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[28] Suspension decisions, made informally in the past by a principal or dean of a school, would be replaced by at least a limited quasi-judicial process.[29] Under *Goss v. Lopez*, the level of due process protection provided to students will therefore increase.

Recent cases underscore some of the sacrifices involved. Judge Gurfein, writing for the United States Court of Appeals for the Second Circuit in another school-related matter, pointed to the inappropriately long delay in such actions, noting that "[a] child who was in the first grade when this action was begun is now ready

27. 419 U.S. 565 (1975).
28. *Id.* at 574.
29. *Id.*

to enter junior high school."[30]

A new and potentially heavy burden of providing numerous hearings is placed on schools. In *Whiteside v. Kay*,[31] a student brought suit relying on *Goss*, alleging that he had been suspended without adequte due process. His school had provided him with three different opportunities to explain his case to three different authorities, with representation by any person of his choice, before the school arrived at a final decision to suspend him. The court held that he had been given adequate due process.[32] However, the provision of three hearings is a considerable burden for a school. It is too early to obtain data on the full effects of the *Goss* requirement. Clearly, however, the spectacle of a school system effectively "on trial" each time it attempts to suspend a student will not be good for school morale.

Privacy values are sacrificed when personal, confidential, and psychological factors are brought into the open so as to meet the due process requirement of exclusivity of record. This requirement demands that any decision must be based only on matters stated in the official record of a hearing.[33] If personal, confidential, or psychological factors are crucial to a decision, they must be stated publicly on the record or the decision-maker is forbidden to consider them.

Board of Curators v. Horowitz[34] illustrates the sacrifice of privacy values to due process in the school context. Horowitz, a medical student, brought suit to challenge her academic expulsion from medical school.[35] Discussions of Ms. Horowitz's personal hygiene, physical appearance, "eccentric" personal conduct,[36] problematic "handwashing and grooming,"[37] and relationships with others appeared in Justice Rehnquist's majority opinion,[38] Justice Powell's concurrence,[39] Justice Marshall's partial concurrence,[40] and the New York Times report of the decision.[41]

30. Chance v. Board of Examiners, 561 F.2d 1079, 1081 (2d Cir. 1977).
31. 446 F. Supp. 716 (W.D. La. 1978).
32. *Id.*
33. B. SCHWARTZ, *supra* note 4, § 125 and cases cited therein.
34. 435 U.S. 78 (1978).
35. *Id.*
36. *Id.* at 93.
37. N.Y. Times, Mar. 2, 1978, §A, at 9, col. 1.
38. 435 U.S. at 81.
39. *Id.* at 93.
40. *Id.* at 98, 102-04.
41. *See* note 36 *supra*.

The Court held that *Goss* guaranteed the right to a hearing for misconduct-based punishments, not for academic expulsions like Ms. Horowitz's.[42] However, it is clearly in the former that personal, private, and psychological factors will have to be brought out for the record.

Apparently Ms. Horowitz did not shrink from this kind of personal publicity.[43] Nevertheless, if "due process" requirements should become increasingly prevalent in dealing with school-related problems of suspension, expulsion and the like, the minimum price to be paid in the sacrifice of privacy which, for most, is a value greatly prized.

B. Welfare Fraud Investigations

A second example illustrates that as other resources become scarce, their sacrifice to the "due process" value becomes more painful and less justifiable. New York City's Department of Social Services promulgated a regulation which cut off welfare payments to recipients who fail to report for interviews concerning fraud.[44] The payments in question were provided under the Aid to Dependent Children program of the Social Security Act.[45] The requirements for eligibility are need, dependency, and submission of certain information which establishes these factors.[46] If the recipient agrees to the interview, benefits are continued even if he or she stands mute or admits committing fraud.[47]

In *Rush v. Smith,*[48] a welfare recipient brought suit challenging the regulation. The United States District Court for the Southern District of New York held that the sole requirement of attendance at the hearing must fail. "The courts consistently have held that a state cannot impose an additional condition of eligibility not required by the Social Security Act."[49] The decision was reversed on appeal,[50] but with the qualification "[r]ecognizing that a restric-

42. 435 U.S. at 82-90.

43. It would seem likely that had Ms. Horowitz found the possibility of personal publicity highly revolting, she would not have brought suit.

44. N.Y.C. Income Maintenance Procedure 78-76.

45. 42 U.S.C. §§ 601-10 (1976).

46. *Id.* § 602(a).

47. N.Y.C. Income Maintenance Procedure 78-76.

48. 427 F. Supp. 576 (S.D.N.Y. 1977).

49. *Id.* at 579.

50. Rush v. Smith, 573 F.2d 110 (2d Cir. 1978).

tion will have a dampening effect on the City's procedure, we nevertheless believe that the termination of benefits to the parent must be accompanied by a provision for protective payments for the children . . . ."[51] Those payments, received and controlled by Ms. Rush, cannot be terminated other than through the proper application of due process procedures. Ms. Rush's refusal to cooperate in a fraud investigation was not enough to terminate welfare benefits.

New York State has refused to increase its state contribution to welfare since 1974 due to its poor economic condition,[52] and has therefore failed to give the affected poor enough money to keep up with the rapid rate of inflation. Even with improvements in the economy, the state will allocate only so much to assist the poor.

Ms. Rush's right to refuse cooperation in a fraud investigation directed at herself must be weighed against the needs of poor persons in other categories. Protecting the uncooperative fraud suspect's rights to welfare benefits means that other potential recipients willing and anxious to establish the truth may be denied benefits. The social cost of this type of decision increases as available resources become more scarce.

C. Economic Management

More broadly, with every increase in the range of judicially enforceable rights, society pays a price in terms of resources it must devote to costly and lengthy litigation. The benefits of managerial decision-making are lost in the judicial decision-making process. It is not only the poor who cause society to incur these costs. The expansion of judicially enforeceable rights has included corporations and others who are well able to engage in legal battles with the government to protect their new "entitlements."

In *Ashbacker Radio Corp. v. FCC,*[53] the United States Supreme Court decided that the FCC must provide comparative hearings when two or more applications for permits of licenses are mutually exclusive. The *Ashbacker* doctrine was subsequently applied to other agencies, such as the CAB[54] and the ICC.[55]

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51. *Id.* at 118. Since the parent controls the money intended for the children, the force of the sanction is substantially diminished.
52. 18 N.Y.C.R.R. § 352.1 (1977).
53. 326 U.S. 327 (1945).
54. Northeast Airlines v. CAB, 194 F.2d 339 (D.C. Cir. 1952).
55. Railway Express Agency v. United States, 205 F. Supp. 831, 834 (S.D.N.Y. 1962).

This judicialization of agency procedure results in the application of due process rules of fairness, consistency, and the opportunity for hearings. As Lon Fuller pointed out in *The Morality of Law*,[56] society will not realize the most effective distribution of resources through the application of these rules:[57]

> To act wisely, the economic manager must take into account every circumstance relevant to his decision, and must himself assume the initiative in discovering what circumstances are relevant. His decisions must be subject to change or reversal as conditions alter. The judge, on the other hand, acts upon those facts that are in advance deemed relevant under declared principles of decision. His decision does not simply direct resources and energies; it declares rights, and rights to be meaningful must in some measure stand firm through changing circumstances. When, therefore, we attempt to discharge tasks of economic management through adjudicative forms there is a serious mismatch between the procedure to be adopted and the problem to be solved.

A wealthy society may be able to afford the cost of the mismatch. A society beginning to feel the pinch of scarcity will call it into question. The judicialization of decision-making process in distributive problems entails resolution at great government expense through lengthy and inferior mechanisms. A better resolution would involve the use of some government expert in the economics, technology, and *perhaps* the law of radio broadcasting to make a policy decision as to which station gets the license. Such a managerial decision would be made with less regard for procedural fairness and more for the rational economics of distribution, the technical questions of minimizing static, and the speed, efficiency, and economy of the decision-making process itself.

Distributive problems like *Ashbacker* are called "polycentric,"[58] and American courts are rife with such problems, which would be far better handled in managerial settings. There are innumerable examples. Courts have tried to deal with problems of school financing, racial balance, voting district configuration, and nuclear reac-

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56. L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

57. *Id.* at 172.

58. Professor Fuller follows M. POLANYI, THE LOGIC OF LIBERTY 170-84 (1951) in using the term "polycentric" to describe distributive problems in which too many variables determine an optimal solution for "parties meeting in open court" to reach such a solution within "the usual adjudicative frame." Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 32-33.

tor location.[59] Courts have failed to find satisfactory resolutions to these problems for the reasons related to the role of the judge in Professor Fuller's exposition[60] and because "[t]he parties are principally interested in winning the case, not in solving a cluster of thorny collateral problems that interwine with the one in which they are enmeshed."[61]

Optimal managerial solutions frequently cannot be equalled by court decisions based on adversary processes. For example, when one Mrs. William R. Timken died in 1959, she left eighty-seven paintings to be divided between the National Gallery in Washington and the Metropolitan Museum of Art in New York, She did not leave instructions as to how the collection was to be divided.[62] Fortunately, rather than litigating the matter, the directors of the two museums found a way to divide the collection which satisfied them both. They made their respective selections based on several values: aesthetic merit, historical significance, monetary value of the individual paintings, and gaps in their existing collections.[63]

It is hard to imagine that the directors could have obtained as optimal a mix of the values they sought had they litigated the matter. In that event, arguments concerning rights, and perhaps efforts to weaken the opposition by withholding information would have played some role. To the extent that any such factors would have influenced the outcome, it would have been less satisfactory than the actual outcome. If, for example, the museums had insisted on receiving shares of equal financial value, other values would have been sacrificed. Since the financial value of an art collection may be greater than the sum of its parts depending on the nature of the grouping, even financial value could have been lost in an adversarial battle for exact division.[64]

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59. Rosenberg, *Let's Everybode Litigate?*, 50 TEX. L. REV. 1349, 1352-54 (1972) and cases cited therein.

60. *See* note 55 *supra* and accompanying text.

61. *Id.* at 1354.

62. N.Y. Times, May 9, 1960 at 31, col. 8; May 15, 1960, at 77, col. 1.

63. *Id.*

64. The two museum directors divided the paintings into 26 sets of two paired groups. For example, one set might include 4 Rembrandts in one group, and 3 Van Goghs in the paired groups. (This example is imaginary.) Then, set by set, the directors stated their respective preferences. If their preferences coincided within a set, they would toss a coin, and the loser would accept the group not preferred. Both directors expressed satisfaction with the results of this system. N.Y. Times, May 15, 1960, at 77, col. 1.

Had the matter been litigated, the results could have been much less satisfactory. To

The museum case is an unusually clear illustration of the inadequacy of the judicial approach to polycentric problems because it provides an actual managerial solution in contrast. However, the museum case involved private managerial decisions. The efforts of government to provide managerial solutions to polycentric problems are all too easily upset by persons who wish to impose solutions that are best for them personally. With the expansion of due process protection, they may succeed in doing so through litigation, as in school discipline and welfare fraud investigation cases.[65] Even if they fail, they may force the courts to provide solutions to problems that courts are ill-equipped to handle.

The values thereby jeopardized by an unexamined and unlimited commitment to due process include privacy, efficiency, distributive justice, and optimality. These are too important to be sacrificed blindly, even for as worthy a goal as the expansion of due process.

IV. Questionable Benefits of Certain Due Process Expansion: A Case Study of Welfare Hearings

The expansion of procedural guarantees of due process is intended to increase the protection of rights, even if it decreases social efficiency. Available data on welfare hearings, however, casts grave doubt on the supposed improvements that judicially-commanded protections were designed to afford. The due process protections

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illustrate simply, assume that the imaginary set used in the example above was by far the most valuable set in the collection. Assume that the Van Gogh group is worth $500,000 and the Rembrandt group is worth $1.5 million, but the Rembrandts broken up and sold separately are only worth $250,000 each, for a total of only $ 1 million. Assume that although the two groups were of unequal value, the directors agreed that since neither should be broken up, the loser of the coin toss would simply accept the Van Gogh group. In that scenario, the "managerial" solution produces $2 million worth of art for the two museums, and through the museums to society.

By contrast, each director could argue that a court's assignment to him of the less valuable group constituted a deprivation of property without due process of law, since parties with equal claims should get equal shares. To meet this "fundamental fairness" argument, a court might have no choice but to assign one of the Rembrandts to the museum that received the Van Goghs, leaving that museum with $500,000 worth of Van Goghs and one $250,000 Rembrandt, and the other museum with three $250,000 Rembrandts, for a monetarily equal division. This "judicial" solution produces $1.5 million worth of art for the two museums, and through the museums, to society. The cost to society of using the judicial solution rather than the managerial solution is $500,000.

Since this is a vastly oversimplified illustration, it fails to take into account all of the other values, besides monetary worth, that are jeopardized by the judicial approach.

65. *See* pt. III (A) & (B).

theoretically guaranteed include rights to a hearing,[66] notice,[67] retained counsel,[68] -no right to appointed counsel[69] -introduction and rebuttal of evidence,[70] exclusiveness of the record as a basis for decision,[71] written findings and supportive rationale.[72]

Eight years following the Supreme Court's decision in *Goldberg v. Kelly*,[73] numerous accounts of the practical realities of the welfare case hearing process are available. These accounts provide a stark contrast to the proud list of theoretically guaranteed rights. The contrast calls into question the assumption that due process rights of welfare recipients have been usefully expanded.

A. Case Law Illustrations

In *Orth v. Blum*,[74] the New York State Queens County Court reviewed a New York State welfare agency "fair hearing" in which the petitioner, Mr. Orth, had been deemed employable and therefore ineligible for welfare. As a matter of agency policy, welfare recipients denied Supplemental Security Income (SSI) by the federal government were automatically considered employable.[75] The petitioner, however, had a back problem which certifiably prevented him from performing any physical activity except sitting.

The court noted that Mr. Orth had offered medical records and doctor's certificates, but the hearing examiner gave him no opportunity to present them. The State Welfare Commissioner, in administratively affirming the decision of the hearing examiner, had said that Mr. Orth had not offered evidence in support of his position. The court subsequently noted that the transcript of the hearing, with the word "unintelligible" appearing so often as to render the transcript indeed unintelligible, was "appalling."[76] The court remanded the matter to the welfare agency with instructions to hear evidence, make an accurate transcript, and follow applicable regulations. Mr. Orth's "fair hearing" was meaningless. He was not

66. Goldberg v. Kelly, 397 U.S. 254 (1970).
67. Administrative Procedure Act § 5(a), 5 U.S.C. § 554(b) (1976).
68. 397 U.S. at 270.
69. B. SCHWARTZ, *supra* note 4, at 287 n. 106.
70. *Id.* § 7(c), 5 U.S.C. § 556(d) (1976).
71. *Id.* § 7(d), 5 U.S.C. § 556(e) (1976).
72. *Id.* § 8(b), 5 U.S.C. § 557(c) (1976).
73. 397 U.S. 254.
74. N.Y.L.J., Sept. 8, 1978, at 13, cols. 1-2 (Sup. Ct. Queens County).
75. *Id.*
76. *Id.*

permitted to introduce evidence, the "record" was almost worthless and the "findings and reasons" were a charade.

Mr. Orth's situation was not atypical. In *Bolhower v. Berger,*[77] the Appellate Division of the New York State Supreme Court reviewed a hearing in which the petitioner, Ms. Bolhower, in 1975 was ordered to pay a 1974 hospital bill of $1,070 based on her 1973 income of $4,282. The hearing examiner refused to accept into evidence Ms. Bolhower's income tax return for 1974 showing a net income of only $1,500, apparently because the hearing officer refused to believe that Bolhower could have lived on so little money. The court, noting that Bolhower's hospitalization for brain surgery in 1974 and illness for an extended period were likely to have reduced her income, remanded the matter to the welfare agency with instructions to "give appropriate weight to the 1974 tax return."[78]

In *Dunbar v. Toia,*[79] the court reviewed a hearing in which the hearing examiner refused to give the welfare recipient, Ms. Dunbar, access to her case file, despite federal regulations requiring that he do so.[80] The state regulations on the subject permitted the hearing officer to restrict recipients' access to the files.[81] At the hearing, the hearing officer announced that he followed the state rule. Counsel for the recipient attempted to point out that the U.S. Constitution states that federal laws are the supreme law of the land.[82] The hearing officer concluded, "we'll follow the state regs because we have a full set of them here."[83]

B. Practical Implications of Case Histories

In assessing the significance of these cases, it is useful to note first, that many or most welfare recipients are not aware that they have a right to a hearing to contest agency decisions against them, and so only a small percentage of violative agency decisions are appealed within the agency.[84] Second, for those that do obtain

77. 61 A.D.2d 971, 403 N.Y.S.2d 259 (1st Dep't 1978).

78. *Id.*

79. 45 N.Y.2d 764, 380 N.E.2d 321, 408 N.Y.S.2d 495 (1978).

80. 45 C.F.R. § 205.10(a)(13)(i) (1977).

81. 18 N.Y.C.R.R. §§ 357.3(c), 358.9, 358.12(a) and (b), 358.16(d) (1977).

82. U.S. CONST. art. VI, cl. 2.

83. Interview with Stuart Miller, Bronx legal aid attorney, who participated in the hearing as counsel for he recipient.

84. D. Kirchheimer and D. Hopsia, *Due Process in Income Maintenance Programs,* N.Y.C. Human Resources Administration, Office of Research & Program Evaluation, June 1976, at 9. One survey cited found that 37% of recipients did not know what a "fair hearing"

agency hearings, violations of due process as reported in the cases discussed immediately *supra* are characteristic and typical.[85] Third, the cases discussed above are *atypical* in that justice eventually prevailed, after the welfare recipients involved obtained legal counsel and appealed the agency decisions. The vast majority of the poor do not have access to attorneys.[86] There are "fewer than 200 full-time lawyers for the estimated two million residents who qualify for free legal aid in noncriminal matters" in New York.[87] Thus, the final resolution of most welfare hearings, no matter how violative of due process rights, is in the hands of the hearing officer.

Carefully adjudicated guarantees of due process mean little in the face of administrative agency responses like these. These incidents indicate limits on the potential of theoretical guarantees for practical results in the field. Without massive efforts to provide legal assistance to larger proportions of the beneficiary population, these theoretical rights are not entirely enforceable. Our society is not going to make the enormous commitment of resources that would be necessary to provide the increase in legal services available to the poor.

Furthermore, the New York State Department of Social Services (DOSS) insists on relitigating matters already decided. In each of the above case histories, DOSS defended agency actions that were obviously inconsistent with the hearing requirements of *Goldberg v. Kelly* or federal regulations. Indeed, DOSS routinely relitigates its abuses of the basic hearing rights granted by *Goldberg v. Kelly*, wasting the precious time of the few available legal aid attorneys.[88]

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was, another found that 43% did not know that they could appeal decisions made at their welfare center, and a third found that 72% did not know they could appeal from such decisions. In a fourth survey, although 42% said that they expressed protest over decisions in some way, only 8.3% said they utilized the hearing process to protest decisions.

85. Interview with Stuart Miller, *supra* note 79.

86. "More than 15.7 million poor do not have effective access to legal assistance." LEGAL SERVICES CORPORATION, ANNUAL REPORT FOR FISCAL YEAR 1976 at 8. The Legal Services Corporation defines "effective access" as two lawyers per 10,000 population, as compared with an existing rate of 11.2 lawyers per 10,000 in the general population.

87. N.Y. Times, Oct. 14, 1977, at B2, col. 1. "To be eligible, the income of a family of four cannot exceed $5800." *Id.*

88. Letter from Stuart Miller, Bronx legal aid attorney, November 17, 1978. Miller quotes a naive dictum that "[t]he Court assumes these public officials, mindful of their responsibilities, will apply the determination here made equally to all persons similarly situated. It would be unthinkable that the defendant would insist on other actions being brought to vindicate the same rights at issue here." *Id.* (quoting Feld v. Berger, 424 F. Supp. 1356, 1363 (S.D.N.Y. 1976).

Further judicial extensions of due process guarantees will not solve this problem, since DOSS can continue to flaunt the law in case after case, complying only in the relatively rare instances when available and determined legal aid counsel can obtain judicial relief. Action in the executive or legislative arenas, respectively to discourage this kind of agency policy or to enable plaintiffs to compel agency adherence to the stare decisis principle, may prove more effective.[89]

Those who can afford attorneys and protracted judicial and quasi-judicial proceedings can make better use of the ramifications of *Goldberg v. Kelly*.[90] This was illustrated in *W.G. Cosby Transfer Corp. v. Froehlke*,[91] which held that corporations denied government contracts have a right to a hearing to contest such decisions.[92] Due process requirements governed hearings given to Summer Food Program sponsors who wanted to participate in the 1977 program, despite their objectionable records of performance in the scandalous 1976 program.[93] New program administrators brought in to run the 1977 program were entangled in those hearings for months despite their efforts to devote time to planning for the 1977 program.[94]

This kind of application of due process principles can result in distributive injustice. Potential Summer Food Program sponsors with financial interests in participating, despite their "non-profit" status, were embroiling administrators in time-consuming appeals. Limited staff time was expended. This staff time would otherwise have been used to improve the program's effectiveness in distributing food to children, a surprisingly difficult task in recent years.[95]

The earlier discussion of *Rush v. Smith*[96] points to another aspect

89. Stare decisis is the principle that one a law is established, it should be applied to all others similarly situated. There is a presumption in New York State and federal courts that government defendants can be relied upon to apply the rule, making class relief unnecessary. *See* Letter from Stuart Miller, *supra* note 88. One possible remedy for DOSS practice is legislative qualification of this presumption.

90. 397 U.S. 254 (1969).

91. 480 F.2d 498 (4th Cir. 1973).

92. *Id.*

93. *See, e.g.*, N.Y. Dep't of Educ., Administrative Decision on Summer Food Service Program Participation by Hassidic Corp. for Urban Concerns (June 30, 1977).

94. *Id. See, e.g.*, N.Y. Post, March 18, 1977, at 7, col. 4.

95. *See, e.g.*, N.Y. Daily News, Aug. 4, 1978, §BK at 1, col. 1; N.Y. Times, Aug. 5, 1978, at 18, col. 1.

96. 573 F.2d 110 (1978). *See* text accompanying notes 43-51 *supra*.

of the potential conflict between the further reaches of due process and distributive justice.

V. Eliminating Excessive Judicial Protection

To the extent that courts are not permitted to resolve conflicts between citizens and government, citizens are denied the protection of due process which courts can provide. That denial is sometimes appropriate.

In 1922, the United States Supreme Court, in *Crane v. Hahlo,*[97] upheld the right of a city agency, rather than a court, to resolve a dispute between the city and its citizens, despite the agency's potential bias in favor of the city. In 1969, New York City removed the resolution of parking ticket cases from the Criminal Court to the City's own Bureau at the cost of some due process protection, for reasons which appear sufficient.[98] Today, sufficient reason warrants the removal of another issue from court to agency in New York City.[99]

A. The Government as Judge in Its Own Case

Citizens engaged in conflict with government may feel that courts are more trustworthy decision makers than agencies, since agencies may have institutional biases of which citizens are aware. The National Labor Relations Board, for example, was created to protect the rights of labor.[100] Notwithstanding any of the Board's history since its creation, the businessman called to a hearing before it may fear an anti-business bias. Institutional bias, as opposed to subject matter bias, has not stood as a proper bar to agency[101] or court adjudication of disputes.[102]

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97. 258 U.S. 142 (1922).

98. *See* text accompanying notes 100-09 *infra.*

99. *See* text accompanying notes 110-34 *infra.*

100. 29 U.S.C. §§ 151-68 (1970).

101. *See* text accompanying notes 94 & 98 *supra.*

102. That the federal government has an interest in collecting as much tax as possible, and that the salaries of federal judges are paid out of federal tax collections, does not disqualify them from hearing tax cases. That criminal court judges may be more sympathetic to cases presented by their fellow employees—prosecutors—than to cases presented by attorneys employed by criminal defendants, does not disqualify them. Judges are not disqualified by reason of their views toward the subject matter of a case. *See, e.g.,* State v. Mills, 91 Ariz. 206, 209, 370 P.2d 946, 948 (1962); *see also* Crawford v. Ferguson, 5 Okla. Crim. 377, 386, 115 P. 278 (1911), in which the court noted, in refusing to disqualify a lower court judge on a question of subject matter bias: "The writer of this opinion was for many years attorney for

In *Crane v. Hahlo*,[103] the plaintiff argued that a New York City agency should not be allowed to assess the amount of damages the City owed her, because of the agency's potential bias in favor of the City. Justice Clark, writing for the Court, simply quoted language from the New York Court of Appeals decision which he affirmed. Justice Clark stated that simply because the agency "was selected by the municipality or other division against which the claim is made," this served as no bar. "If it were otherwise, a great many bodies passing in a judicial capacity on claims, from the board of claims down, would be disqualified."[104]

B. Case Study: New York City Parking Violations Bureau

Crane is still good law,[105] and municipalities continue to withhold the degree of due process protection involved in having matters adjudicated by an agency in interest. For example, in 1969 New York City set up an administrative agency to conduct proceedings for the collection of parking ticket fines.[106] The Parking Violations Bureau (PVB), an agent of the city government, has an obvious interest in maximizing revenues collected. A conflict of interest is generated by giving such an agency the responsibility for adjudicating cases, which if decided in favor of the City will produce revenue, and if decided in favor of the citizen, will not. Innocent motorists have had their legally parked cars ticketed, apparently as a result of revenue production policy.[107] The PVB may well tend unduly to find motorists guilty in order to collect as much revenue as possible.[108]

This presents the appearance, if not more, of a sacrifice of the

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the Anti-Horse Thief Association. He confesses to a strong prejudice against horse-stealing, but he has no prejudice against any individual, merely because he may be charged with this offense . . . ." *Id.* at 386.

103. 258 U.S. 142 (1922).

104. *Id.* at 149 (quoting People *ex. rel.* Crane v. Hahlo, 228 N.Y. 309, 318 (1920)).

105. *See, e.g.*, Haney v. Chesapeake & O. R.R., 498 F.2d 987, 992 (D.C. Cir. 1974); Sparks v. Wyeth Laboratories, 431 F. Supp. 411, 416 (W.D. Okla. 1977).

106. N.Y. VEH. & TRAF. LAW § 225 (McKinney 1978).

107. In 1976, Assemblyman Charles Schumer and three parking violations agents revealed that there was a daily summons "quota" for the agents. Failure to meet the quota could result in penalties for the agents ranging from a $50 fine to dismissal, and so agents were encouraged in this manner to bring in as much revenue as possible. This meant that they would even ticket legally-parked cars. N.Y. Times, Sept. 17, 1976, § 1, at 1, col. 6.

108. James McGowan, Assistant Counsel to the Automobile Club of New York described the PVB hearing process by saying, "There's almost a predisposition to find you guilty." "Why You Can't Beat Parking Raps," N.Y. Post, Oct. 27, 1977, at 23, col. 3.

right of the individual to a fair trial. The compensatory gain is New York City's freedom from the costs of litigating the parking infractions. The introductory language[109] of the 1969 legislation enabling administrative agencies to adjudicate traffic infractions describes the burden the PVB was to lift from the criminal courts:[110]

> The legislature hereby finds that the incidence of crime in the larger cities of this state has placed an overwhelming burden upon the criminal courts thereof. This burden, when coupled with the offenses of traffic infractions, has resulted in a situation in which the prompt and judicious handling of cases becomes virtually impossible.

The legislative statement told only of the criminal court's workload pressures alleviated by the removal of parking and traffic cases. Another major impetus for the creation of the PVB was the inability of the criminal court to deal with more serious matters. As a result of the court's relative disinterest in pursuing parking offenders, the City was failing to collect the fines on almost 70 percent of the tickets it issued. Collections for parking violations in 1969 were only $ 21.4 million.[111]

The PVB has significantly improved parking fine collections. During the 1976-77 fiscal year, the Bureau collected over $ 87 million in fines.[112] The PVB has not effected a utopia in terms of parking in New York City. Traffic flow conditions are still terrible.[113] However, the situation in 1969 was much worse.

At that time, the impunity with which parking violators could ignore the law was creating problems of an increasingly serious nature. Illegal parking often limited scarce street space for maneuvering so that traffic conditions caused critical street congestion. Emergency vehicles could not get through.[114] Buses and trucks had to unload under hazardous conditions. Department of Sanitation street cleaning was impaired.[115] While these conditions continue to

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109. 1969 N.Y. Laws, ch. 1074, § 1. *See also id.* ch. 1075 (amending N.Y. VEH. & TRAF. LAW § 155 (McKinney 1978). *See* 1969 N.Y. Legis. Record and Index 595.

110. N.Y. VEH. & TRAF. LAW § 225 (McKinney 1978), introductory language to enabling legislation, 1969 N.Y. Laws, ch. 1074, *quoted in* "Legislative Findings and Purpose," N.Y. VEH. & TRAF. LAW § 64 (McKinney 1978).

111. Interview with Ida Zamist, Statistics Office, Records of Traffic Summons and Control Bureau, New York Criminal Court (May 1978).

112. N.Y. Post, Oct. 27, 1977, at 23, col. 3.

113. N.Y. Times, Oct. 17, 1976, § 1, at 1, col. 6.

114. PARKING VIOLATIONS BUREAU DIRECTOR'S HANDBOOK 1 (D. Feldman ed. 1969).

115. *Id.*

exist, they are no longer of crisis proportions.

The PVB achieved certain goals by removing issues from the courts. The cost of achieving those goals was the lessening of judicial protection of individual rights. In view of its record, the PVB can certainly be said to provide less due process than the courts. Yet, the sacrifice of some degree of due process appears to have been worthwhile.

C. New York City Tax Certiorari Proceedings: A Proposal for a Model System

New York City's tax certiorari proceedings provide an example of a situation in which the social costs of excess litigation can be eliminated by reducing the procedural due process protection of access to judicial review, with no corresponding reduction in substantive rights. Real estate assessments in New York City are under the purview of the City's Finance Administration.[116] If the property owner thinks the assessment and, thereby, the taxes on the property are too high, he or she may appeal to the City's Tax Commission.[117] The Tax Commission, a body independent of the Finance Administration, has its members appointed directly by the Mayor.[118]

Decisions by the Tax Commission may be appealed by the property owner to the special term of the supreme court in the judicial district where the real property is situated.[119] There, real estate appraisers often serve as expert witnesses for property owners and testify that the assessments are too high. The City's expert witnesses testify that the assessments are correct or too low.

In 1975, 1976, and 1977, New York City paid three tax certiorari witnesses, who shared one office, over $ 1 million in fees. This constituted more than sixty percent of the total paid to all tax certiorari expert witnesses by the City in that period.[120] One of the three received approximately $200,000 annually.[121]

The appraisers used by the City were by no means incompetent.

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116. NEW YORK CITY CHARTER § 1503(1) (1977).

117. *Id.* § 166-1.0 (1976).

118. *Id.* § 153(a) (1977).

119. *Id.* § 166-1.0(d) (1976); N.Y. REAL PROP. TAX. LAW §§ 700-26 (McKinney 1977 & Supp. 1978).

120. N.Y. State Assembly Subcommittee on City Management, City Fees Paid to Expert Witnesses in Tax Assessment Cases 2 (July 21, 1977) [hereinafter cited as City Fees].

121. *Id.* Archives of the Office of the Comptroller of the City of New York.

However, they were not outstandingly successful in winning cases.[122] Of the several hundred independent real estate appraisers in the city, the City assigned all its work in this field to approximately one dozen, and the bulk of that to the aforementioned three.[123]

No stated guidelines controlled the selection of the recipients of these enormous appraisal fees from the City.[124] The director of the real estate tax division of the Corporate Counsel's office, who selected the appraisers on his own, said that the question of guidelines was academic as the City had no need for any new appraisers.[125]

This selection process was neither open nor fair, and raised the spectre of impropriety. The size of the awards and the permanence of the small group receiving them raised questions about the objectivity of the testimony they gave as "impartial expert witnesses." In response to public disclosure of this situation in July 1977,[126] the City set up a panel to examine interested real estate appraisers and assign expert witness contracts to those who were best qualified.[127]

Apparently, no corruption underlaid the selection of appraisers under the old system.[128] Rather, the City only had a small pool from which to choose, because most real estate appraisers preferred not to testify in court. Of those that did, most preferred the more lucrative private sector practice to working for the City.[129]

It may have been economical for the City to give much of its work to only three of the group. Those three, and their former associates, had been testifying for the City for 40 years. When preparing to testify by researching the value of a parcel, their voluminous files would probably have included most of the information necessary, based on previous cases. They could dispense with much time-consuming research, and thereby charge the City less than would

122. City Fees, *supra* note 120.

123. *Id.*

124. City Fees, *supra* note 120, at 3.

125. *Id.*

126. N.Y. Times, July 22, 1977, at B3, col. 3.

127. *Id.*

128. The investigation upon which the N.Y. Times article of July 22, 1977 was based, was conducted by the New York State Assembly Subcommittee on City Management, under the direction of Assemblyman Charels Schumer, Chairman, and the author, as subcommittee counsel. Despite intensive research, the subcommittee found no evidence of corruption.

129. Subcommittee counsel and Anna Quindlen, the author of the New York Times article of July 22, 1977, each independently surveyed the industry, and each found that most appraisers preferred not to do "City" work for the reasons cited in text. *Id.*

other appraisers.[130] Thus, given the economic structure of the industry, reform of the witness selection process was not likely to create significant savings for the City.

The solution lay in altering the legal structure of the process. The problem was that the City needed to hire expert witnesses for the court proceedings. If the factual issues could be resolved without those witnesses, and without jeopardizing the City's ability to obtain fair decisions on appraisals, tremendous savings could be effected. The answer was to remove the resolution of the issues of fact, the determination of the correct assessment, to an administrative forum.

Assemblyman Charles Schumer, Chairman of the New York State Assembly Subcommittee on City Management, proposed the establishment of a "Property Tax Review Board."[131] Such a forum could be established as a division of the Tax Commission to hear appeals from the Commission's initial rulings. The Board would consist of two distinguished professional appraisers with a minimum of ten years experience in the field, and an attorney with at least ten years experience in real estate law.[132] The selection process would include public announcements and the participation of professional appraisal organizations. It would be designed to ensure that the members be of the highest professional caliber and integrity, and as independent of political influence as possible.[133]

Under this plan, property owners could bring their expert witnesses and attorneys before the Board. The City would continue to be represented by the Corporation Counsel and would call on its own Finance Administration employees, who did the initial assessment, to testify on the City's behalf. The City could rely on the professional ability of the Board to make fair and accurate appraisals on the basis of testimony by witnesses for both sides, reports of the City assessors, and findings of fact by the Board's own staff.[134]

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130. *See* N.Y. Post, July 22, 1977, at 77, col. 1. The statement of one of the three favored appraisers, S. Simms, quoted therein, corroborating the analysis in text, was in turn corroborated by the survey conducted by Subcommittee Counsel. Simms stated that he had been hired "because of the quality of my work. I've accumulated priceless experience in 40 years." *Id.*

131. N.Y. State Assembly Subcommittee on City Management, Proposal for the Establishment of a Property Tax Review Board (July 22, 1977), A. 8019.

132. *Id.* at 1.

133. *Id.*

134. *Id.* at 2.

Property owners would retain the right to appeal the findings of the Board to the appellate division. However, under this plan, the scope of review would be limited. The appellate division would no longer be able to rule on issues of fact, such s the correct assessment, but would be limited to rulings on issues of law, including determinations, if appropriate, that there was no "substantial evidence" to support the assessment decision made by the Tax Commission.[135]

The appellate division would only review the record, without providing further opportunity for expert witness testimony. When the court finds no "substantial evidence" to support the decision of the Board, or other errors of law, the case would be remanded to the Board for rehearing under appropriate directions. Even then, there would be no need for a "battle of experts" in court.[136]

The City's use of expert witnesses has cost approximately twice what such a Board would, calculated on a per case basis.[137] Assuming a static caseload, the City would save approximately $250,000 annually by establishing the Board.[138] This does not even consider the value of reducing the appellate court's caseload. Should the caseload increase, which is probable when the "full-valuation" requirement is comprehensively implemented, the disposition of individual cases would be less expensive through such a Board. While it is realized that the total cost of disposing of a greatly increased number of cases through a Board would be greater than the present cost, it certainly would be much less expensive than the present system faced with such an increased caseload.

This proposal is currently under serious consideration by the City's Law Department as well as its Office of Management and Budget.[139] It would sacrifice the right of the individual to a judgment on the facts made by a presumably impartial court rather than by

135. The "substantial evidence" rule requires the reviewing court to accept the administrative agency's decisions on issues of fact, unless there was no "substantial evidence" to support the agency's decisions. In that case, or if there are other issues of law that may affect the resolution of the factual issues, the court must remand the matter to the administrative agency with instructions to hear appropriate evidence and/or alter its findings as necessary. *See* B. SCHWARTZ, *supra* note 4, § 210.

136. *See* note 129 *supra.*

137. City Fees, *supra* note 120, at 2.

138. *Id.*

139. Letter from James R. Brigham, Director, New York City Office of Management and Budget, July 18, 1978; Assembly Subcommittee on City Management, File Memorandum, Tax Certiorari Situation, (October 28, 1978).

an agency of the individual's opponent, the City. The sacrifice is one of form only, since the substantive rights of the taxpayer would not suffer at all.[140] In return, it would save money for New York City, eliminate improper selection processes, reduce the caseload of the appellate division, and provide a more efficient system for the resolution of tax assessment disputes.

VI. Conclusion

The value of certain recent expansions of due process is insignificant or illusory, while the cost is high. In New York, welfare recipients are entitled to a hearing on a grant reduction of $ 3.50 in total.[141] Welfare recipients refusing to cooperate in fraud investigations cannot be deprived of the significant part of their benefits.[142] At the same time, the Welfare Department continues the most egregious violations of truly important substantive rights of welfare recipients.[143] The "trappings" and theoretical requirements of recent extensions of due process do not prevent such deprivations. Only the tiny percentage of welfare recipients who are aware of their hearing rights and are able to obtain legal counsel can take advantage of those "guarantees." More likely, as in the case of fraud investigation, the extensions contribute to distributive injustice.

An excessive unwillingness to leave decision-making power in the hands of city agencies, schools, and government managers generally can result in inefficiency, injustice, pain, and hurt to individuals. The remedy is hard to prescribe. However, by adopting policies that generate harmony, cooperation, and trust, it may be possible for government to encourage a less adversary ethos.

By and large, our government officials, when given real latitude, have merited trust. In the Social Security Administration, for example, administrative law judges act as attorney for the government, attorney for the client, and judge. Yet, these judges decide against the government in about half the social security disability cases brought before them.[144] This is a record, Justice Blackmun said, that "attests to the fairness of the system and refutes any implication of impropreity."[145] Indeed, eighty percent of Americans who have had

140. *Id.*
141. Pagan v. Wyman, 33 A.D.2d 892, 305 N.Y.S.2d 971 (1st Dep't 1969).
142. *See* text accompanying notes 43-51 *supra.*
143. *See* text accompanying notes 70-83 *supra.*
144. Richardson v. Perales, 402 U.S. 389, 410 (1971).
145. *Id.*

personal experiences with government agencies feel they were treated fairly.[146]

The American commitment to due process should no longer be an obsession, transforming us into a nation of litigants. Such a nation, as Plato warned, is doomed to failure.[147] Rather, it is necessary to chart a careful course away from excessive judicial guarantees of due process in administrative agencies. Untrammelled agency power is a grave danger, but public consciousness of *that* danger is already high. The task of reducing the habits of litigation demands a more urgent raising of public consciousness.

It is always necessary to question the actions of our government, and never allow government-fostered injustice to go unchallenged or uncorrected. It is time, however, for the institutionalization of the adversary process at every point of contact between citizen and governmental to halt, for otherwise creative and positive functions of government will themselves halt in a sticky mire of litigation.*

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146. D. KATZ, et. al., BUREAUCRATIC ENCOUNTERS 120-21 (1975). This work is a book published by the Institute for Social Research of the University of Michigan at Ann Arbor, based on a national sample taken by their Survey Research Center in 1973.

147. PLATO, THE REPUBLIC, bk. III, pt. 405, at 110-11 (1956) (W.H.D. Rouse transl.).

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