UNEMPLOYMENT COMPENSATION: CONTINUITY, CHANGE, AND THE PROSPECTS FOR REFORM

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INTRODUCTION

The Symposium proceedings for which this Introduction provides an overview had a decidedly reformative impulse and focus. Authors and discussants came together not just to ruminate about the future, but to grapple with concrete problems that are both a legacy of the past and the product of relatively recent changes. Reformers found much to criticize and to suggest, whether their focus was on stable structures or newly emerging issues. The purpose of this Introduction is to synthesize the views expressed and to reflect on them from the perspective of a student of benefits administration, but one not expert in the particular program under review.[1]

Continuity

The unemployment compensation programs of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands[2] are part of the overall vision of Social Security enunciated by the President's Committee on Economic Security in 1935.[3] In the midst of what we now call the Great Depression, the President's advisors recognized the critical need to stabilize family incomes in the face of economic changes that displaced workers in one part of the economy but did not

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1. No attempt will be made to reference specifically each idea, argument, or claim of the papers prepared for the Symposium. Indeed, many of the views described were a product of discussion and were not, therefore, memorialized in the prepared texts.

2. 26 U.S.C. 3306(j) (1994).

3. *See generally* REPORT OF THE COMMITTEE ON ECONOMIC SECURITY (1935) (providing recommendations that were the basis of the Social Security Act, Pub. L. No. 271, 49 Stat. 620, codified as amended in scattered sections of 42 U.S.C.).

immediately re-employ them elsewhere. A substantial portion of these transitions was thought to involve short-term redeployments which could be cushioned and perhaps facilitated by cash payments. Today's unemployment compensation system was designed as the answer to a particular question—how to maintain income security and consumer purchasing power during economically induced short-term unemployment.

But this vision of provision for short-term unemployment, including its usefulness in maintaining purchasing power and in assisting in the general recovery of the economy, did not exhaust the vision of the Committee on Economic Security. That Committee also recognized that some unemployment would be long-term or "structural." These different and larger spells of unemployment would require different remedies: services to retrain workers for different employment and public works projects as a means of increasing the demand for labor during periods during which there was a significant imbalance between supply and demand.

As we consider the present day successes and problems of the unemployment compensation system, therefore, we must keep in mind that important parts of the labor market program that represented the vision of 1935 were never fully realized. To be sure, we have multiple programs that attempt to facilitate return to work or vocational rehabilitation for displaced workers. But it seems fair to say that these programs have had, at best, quite mixed success. On the other hand, the public works aspect of the New Deal vision, which was intended to deal with long-term and structural unemployment on a broad scale, was never really tried. It had a brief flowering in the 1930s, but guaranteed public employment has never again been a major part of federal or federal-state labor market policies.[4]

Whether or not one believes that Works Progress Administration-like programs can be designed and administered effectively, their absence puts significant pressure on the unemployment compensation program. When there are long stays on the compensation rolls, widespread exhaustion of benefits, and recycling of marginalized workers through the system, unemployment compensation is called upon to solve

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4. *See generally* PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES (1989) (discussing the history and operation of work programs and guaranteed work proposals).

problems that it was not designed to address. Hence, to some degree the problems apparent in the unemployment compensation system are a legacy of the underdevelopment of programs that were meant to deal with structural labor market issues.

Indeed, this point about the incompleteness of protections against involuntary unemployment can be further generalized. The unemployment compensation system is part of a complex of programs of social provision that have overlapping boundaries. To the extent that our social welfare structure lacks reliable and adequate family supports, generalized short-term disability insurance, or effective enforcement of nondiscrimination norms, additional pressures will be put on the unemployment compensation program. And, while these pressures are problems *for* unemployment compensation, to the extent that they are created by more general problems in the economic and programmatic environment within which unemployment compensation operates, they are not necessarily problems *with* unemployment compensation itself. The opposite is also true. Unemployment compensation constitutes part of the environment of other programs. Its particular structures and limitations will place pressure on other sources of income support as beneficiaries exhaust their benefits or as claimants discover that, for one reason or another, they are ineligible for unemployment compensation payments.

An important continuity in unemployment compensation, therefore, is a legacy of programmatic incompleteness or underdevelopment. Other continuities are equally important. As the Articles in this Symposium demonstrate, two other major aspects of unemployment compensation's legacy are its unique state-federal structure[5] and its racist past.[6] Whatever the strengths of "cooperative federalism," the state-federal nature of the unemployment compensation program clearly complicates the politics of rationalizing coverage, restricts the facility with which unemployment compensation can carry out its macroeconomic stabilization function, and obscures lines of

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5. *See* John C. Gray, Jr. & Jane Greengold Stevens, *The Law and Politics of the Enforcement of Federal Standards for the Administration of Unemployment Insurance Hearings*, 29 U. MICH. J.L. REF. 509 (1996); Gerard Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. MICH. J.L. REF. 527 (1996).

6. *See* Laurence E. Norton II & Marc Linder, *Down and Out in Weslaco, Texas and Washington, D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance*, 29 U. MICH. J.L. REF. 177 (1996).

political accountability for unemployment compensation decision making. These ambiguities can lead to starkly different perspectives, ranging from those who see the unemployment compensation program as a federal responsibility inadequately administered,[7] to those who view unemployment compensation as a state function occasionally nudged in one direction or another by federal officials sensitive to charges of federal meddling with essentially state responsibilities.[8]

The problems of a racist past are shared with other federal-state cooperative programs, such as Aid to Families with Dependent Children, and even with New Deal social insurance initiatives such as Social Security pensions. Recapturing that past, however, may cast current arrangements in a new light and make certain exclusions from unemployment compensation coverage seem "arbitrary" in a much stronger sense than merely anomalous.[9]

Finally, there are strong continuities in the administrative difficulties of unemployment compensation adjudication.[10] Not only has the hybrid inquisitional/adversarial decision process been contested terrain throughout the life of the program, but unemployment compensation also shares this uneasy compromise with many "mass justice" programs.[11] The salient contemporary issues of adjudicatory design thus resonate with chords that have been played out in this and other programs since the beginnings of the administrative state.[12]

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7. *See, e.g.*, Gray & Stevens, *supra* note 5, at 510.

8. *See, e.g.*, Hildebrand, *supra* note 5, at 527.

9. *See* Norton & Linder, *supra* note 6.

10. Sharon M. Dietrich & Cynthia L. Rice, *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, 29 U. MICH. J.L. REF. 235 (1996); Mary K. Gillespie & Cynthia G. Schneider, *Are Non-English-Speaking Claimants Served by Unemployment Compensation Programs? The Need for Bilingual Services*, 29 U. MICH. J.L. REF. 333 (1996); William W. Milligan, *Essay: Torquemada and Unemployment Compensation Appeals*, 29 U. MICH. J.L. REF. 389 (1996); Allan A. Toubman et al., *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REF. 407 (1996).

11. *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 23–40 (1983) (discussing the design of disability adjudication processes as a compromise among ideal visions of administrative justice).

12. *See generally* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985) (describing the development of procedural due process in response to the growth of state and federal administrative law).

Changes

The concerns that motivated the Articles in this Symposium, however, were not exclusively, or even principally, concerns that address the continuous or long-term problems of unemployment compensation design and administration. The authors and discussants who came together for this conference were concerned equally with the pressures that the program is experiencing because of changes in its social, economic, and political environment. To quickly unpack these ideas, consider the following:

First, a social dimension. The family economic unit that was the paradigm for those who originally designed the unemployment compensation system was the nuclear family of the 1930s. Dad worked in the market, Mom worked at home, and the kids went to school, until they took their usually gender-specific places in a new family economic unit. In contrast, the world of the late twentieth century is a world that features, not only many single parent families, but also a majority of two-earner households. In the 1930s, when Dad shifted jobs or Mom became pregnant, the stereotype held that there were modest ripple effects on the economic welfare of the other members of the household. Today, society more readily acknowledges that pregnancy may deny a family economic unit an adequate income, and changes in a spouse's work location or conditions may have strong effects on the ability of the other to continue in his or her customary employment. It is not clear whether or how the unemployment compensation system can deal with these issues, but it is being asked to do so.

Second, from a labor market perspective, it is equally obvious that the world of work has changed radically since 1935. Indeed, change in the workplace is now so rapid that it is not entirely clear what it means to have a "job." It surely does not mean the stable progression up some ladder of seniority or changing skill levels within a single firm. Firms are re-engineering, downsizing, outsourcing, merging, and dissolving in ways that radically alter the nature of work. More and more workers seem marginal or contingent, and displacement seems less and less likely to lead to re-employment in a similar job at similar wages. These changes, once again, put massive

pressures on the unemployment compensation system to respond to the changing nature of work.

Finally, there is politics. The changing nature of the family economic unit and of the workplace raises politically contentious questions about the fundamental structure of the unemployment compensation system. The infusion of family policy issues and of concerns about the radical contingency of work into unemployment compensation planning calls into question the basic presupposition of employer responsibility for financing an experience-rated system. It also generates a host of new issues about the voluntariness or involuntariness of unemployment.

To the extent that the unemployment system is asked to respond to these changes and pressures, reformers often look in the direction of a broader socialization of the risks that unemployment insurance historically has covered. Yet, in the current political world, Americans are more inclined to think in terms of individualistic solutions. Rather than further socializing risks, the current political agenda focuses attention on the means for privatizing social programs and places an even greater emphasis on reshaping the economic incentives of individual actors as a means of constraining governmental program costs. A broader socialization of risks may well be what is needed in the unemployment compensation program and other governmental programs. But, it may also be the case that American political life has lost the sense of social solidarity that infused the vision of 1935 and made social insurance seem like such a logical and promising solution to the nation's economic ills.

Given what has been said, it is hardly surprising that there is a large agenda of issues confronting the unemployment compensation system. In the rest of this Introduction, I will not attempt to summarize all of the arguments presented by the contributors to this Symposium. Instead, the attempt will be to frame the debates that surrounded particular paper presentations in terms of the broader issues of continuity and change.

The first day's sessions were devoted primarily to substantive issues of unemployment compensation program design and adjudication that result from contemporary changes in the social and economic environment of unemployment compensation administration. Nevertheless, as we shall see, some problems that are a part of the legacy of unemployment compensation's programmatic history also were a part of this

debate about the appropriate coverage of the program. By contrast, the second day's discussions were devoted primarily to issues of administration and adjudication. These are issues that are endemic to the program as designed, although there are many modern wrinkles on old themes.

I. UNEMPLOYMENT COMPENSATION IN THE NEW WORLD

The papers presented during the first two sessions of the Symposium[13] might be characterized as based on the presumption of the loss of two icons of 1950s popular American culture. These authors and discussants explained that the world of Ozzie and Harriet and of Dagwood and Blondie is gone, perhaps never to be recovered. Not only did these television and cartoon characters represent the paradigmatic nuclear family, their job situations were as stable as their family units. To be sure, Dagwood often quit and Mr. Dithers fired him with equal regularity. But Dagwood and Dithers always made up the next day, or at least before the next Sunday edition. Dagwood never got in line at the unemployment compensation office. I believe Harriet once toyed with the idea of work outside the home, but some felicitous scriptwriter's inventive mind spared the family this seismic dislocation.

The authors and commentators agreed that there had been some changes in unemployment compensation itself. Pressured by changes in employment and in family situations, unemployment compensation policymakers have been forced to rethink the idea of the voluntariness of quitting, the meaning of availability for and the suitability of work, and the employer's fault or faultlessness in discharging employees who require some accommodation to changed personal or family circumstances. The groups most at risk in the evolving environment include women, families with dual earners, low-wage workers, and contingent workers.[14] The novel claims and

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13. Mark R. Brown, *A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J.L. REF. 41 (1996); Amy B. Chasanov, *Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. MICH. J.L. REF. 89 (1996); Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REF. 131 (1996).

14. The United States General Accounting Office defines "contingent workers" as those workers who are employed in part-time, temporary, contract, and other types of nontraditional work arrangements. U.S. GEN. ACCOUNTING OFFICE, WORKERS AT RISK: INCREASED NUMBERS IN CONTINGENT EMPLOYMENT LACK INSURANCE, OTHER BENEFITS 2 (1991).

special circumstances of these workers have broadened coverage in the adjudicatory process to some degree, but in a highly variable manner, both across and within states. Meanwhile, the fiscal pressures that have attended these changes have led to continuous legislative attempts to tighten up on eligibility conditions, particularly the severity of the disqualification period.[15]

While the authors and commentators agreed on the basic social and economic changes that now challenge unemployment compensation, they disagreed on the appropriate response to these challenges. For some the notion clearly was that, because the world has changed, unemployment compensation must change accordingly. Others were more skeptical that appropriate adjustments could be made within the unemployment compensation program. They suggested, either implicitly or explicitly, that the problems of this new world might better be addressed through alternative programmatic interventions.

II. WORKING FROM WITHIN: APPROACHES TO THE ADJUSTMENT OF UNEMPLOYMENT COMPENSATION

A. Major Redesign

Those who favor large scale adjustments in the unemployment compensation system implicitly accept a conception of the goals of the unemployment compensation program that goes beyond simple protection against short-term job loss brought on by economic conditions, either within the economy generally or in the fortunes of a particular employer. Moreover, these reformers are willing to socialize risk in ways that increase fairness to employers while also increasing coverage for employees.

From this socialization perspective, for example, the significant difficulties that pregnancy and child care now present for single parents or two-earner families suggest a simple solution: Make unemployment compensation available to pregnant women. Thus reformed, unemployment compensation would

15. *See* Walter N. Adams, Effects of the Trend Toward Tightening Eligibility Conditions for Entitlement to Unemployment Compensation (1995) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

cover a risk that is seen increasingly as an employment risk and which generates considerable conflict and inconsistent intrastate and interstate decisions. For, as was ably demonstrated at this Symposium, the jurisprudence of unemployment compensation and pregnancy verges on the incoherent.[16] Pregnancy may not be a "good cause" for quitting, but neither is it a good excuse for firing. Whether a pregnant woman collects unemployment compensation may thus depend entirely on whether she quits or is fired. Similarly, while pregnancy alone is not a cause for quitting, a medical recommendation that a pregnant woman should quit will often provide good cause. There is then the question of whether a pregnant woman who leaves for medical reasons is available for work or can only qualify for unemployment compensation post partum. And, in the latter case, those women who quit their jobs near the end of a pregnancy with a good medical excuse get post partum benefits, while those who simply leave do not.[17]

Pregnancy cases provide good, but hardly unique, examples of a confused and confusing jurisprudence generated by unemployment compensation's attempts to grapple case-by-case with new social demands. Reform-oriented responses to the developing "Catch 22" situations revealed by the unemployment compensation cases thus include much more general proposals. For example, the "losing one's job versus leaving one's job" problem that has just been detailed with respect to pregnancy infects a range of other reasons for terminating employment. This leads some to believe that we simply should stop worrying about the losing versus leaving question. Such a move would have the advantage of taking the issue of fault out of adjudication, which could be combined with the elimination of experience rating in order to ensure fairness to employers.[18]

There is of course a progressive logic to these sorts of big ideas. Just as the elimination of losing versus leaving controversies seems to point inexorably to the elimination of experience rating, so too does the increased socialization of risks that these ideas entail also point toward a further federalization of the unemployment compensation system. While socialization of risk can be attempted at the state level, states run grave

16. *See* Brown, *supra* note 13, at 45–49.
17. *See id.* at 54.
18. *See* Chasanov, *supra* note 13, at 129; Malin, *supra* note 13, at 167–68.

risks, or believe that they do, in terms of employers' perceived costs for unemployment compensation. Thus, it is difficult, to say the least, for states to move too far out in front of their fellow states whose response might be, not to follow their lead, but to attempt to attract their industries. The obvious solution is further federalization of the state system through increased mandatory requirements or even a wholesale federal takeover. For some this might be justified on other grounds as well. Recessions and economic readjustments do not apply to the whole country simultaneously or with the same severity. Hence, the continued use of state administration and financing may compromise unemployment compensation's macroeconomic function—the dampening effect on the business cycle.[19]

B. Incremental Changes

Others who believe that unemployment compensation must change in order to accommodate new social and economic realities are concerned that the political context will not permit large changes. They are equally concerned that some of these large changes may have rather uncertain effects. Hence, they propose to pursue incremental reform that moves in the direction of broadening the purposes of the program and of socializing its cost, but only in small steps.

Thus, for example, participants in this Symposium suggested that, although making unemployment compensation available to all pregnant women may not be a politically viable strategy, a smaller change could be accomplished, such as excluding time lost to pregnancy and child bearing from work force participation computations. Others who doubt whether the elimination of experience rating is either feasible or prudent would nevertheless modify specific experience-rating rules to deal with the perverse incentives created by independent contracting. Some who are concerned with the vagaries of interstate and intrastate adjudicatory decision making would favor considerably more regulatory activity at both the state and federal level to rationalize decisional criteria. Finally, others suggest continuing the piecemeal attempt to build

19. *See* Gray & Stevens, *supra* note 5, at 511.

family support responsibility ideas into unemployment compensation criteria in a case-by-case incremental fashion.

For some, these incremental changes are adjustments that are appropriate and sufficient to deal with the discrete problems that they see in unemployment compensation administration. For others, they represent first steps whose progressive logic probably would lead to broader changes in unemployment compensation in order to rationalize incremental reforms.

III. THE SEARCH FOR ALTERNATIVE SOLUTIONS

While recognizing the changes that have occurred in unemployment compensation policy and the emergence of new issues related to changes in family structure and the job market, some participants in this Symposium were skeptical that calls for either radical or incremental reform were grounded in solid evidence concerning the program's dynamics. These skeptics conceded that the percentage of covered persons who draw unemployment compensation when unemployed has been trending downwards and that there has been some tightening of nonmonetary eligibility criteria. They questioned, however, whether it is possible to move from the acknowledgement of these programmatic changes to specific effects on particular types of workers or on trust fund solvency. The aggregate data suggest an important question concerning the effectiveness of coverage, but do not yet yield an answer concerning the effects of particular policies on the discrete groups that have been said to be most at risk of dropping out of the unemployment compensation safety net.

There were those who wondered whether the unemployment compensation program should be altered to deal with problems for which it was not originally designed and which might compromise the integrity and administrative capacities of the core functions of the program. From this perspective, it may well be true that the penetration of younger, contingent or marginal workers for whom unemployment compensation provides modest security in the labor market is increasing. But the question remains whether the unemployment compensation program should be redesigned to try to provide benefits to those not "significantly attached" to the labor force. Both the

stability of trust fund financing and its equitable distribution would seem to be at stake in such changes.

In addition, there were concerns about the administration of a "reformed" unemployment compensation system with a broader focus. In particular, if the program were to attempt to accommodate personal or family problems, it would necessarily be acting on the basis of types of evidence that have not heretofore been an important part of the unemployment compensation adjudicatory process. Some participants worried whether issues such as family composition, caretaking responsibilities, and accommodation to spousal demands, could be verified appropriately within the context of the unemployment compensation eligibility determination process.

An important strain in this line of thought emphasized the responsibilities of programs other than unemployment compensation. It is at least plausible to suggest that the issues emerging in unemployment compensation are really problems resulting from failures in the educational system, in family support programs, such as Aid to Families with Dependent Children, Social Security Disability Insurance, and child support enforcement, or from other gaps in the social safety net, such as the extremely modest coverage of short-term disability programs, either public or private. The basic notion here is that, while the gaps and inadequacies in these other programs might put pressure on the unemployment compensation system, that does not necessarily provide a strong argument that we must solve those inadequacies within the unemployment compensation system itself. For, if those attempts undermine the actuarial soundness or administrative legitimacy of unemployment compensation, they not only would have failed to solve the difficulties of particular groups who are now marginalized by unemployment compensation, but also would have undermined support for the historic core of the unemployment compensation program's mission—transitional support for primary earners with strong labor force attachments.

The questions raised also go beyond effects on the unemployment compensation program as constituted. If public policy should move in the direction of increasing family supports and, in particular, broadening the accommodation of personal and family responsibilities in the workplace, it is not obvious that the unemployment compensation program is adequate to the task. It may well be the case, for example, that employers should be forced to be more accommodating with respect to

family caretaking activities, dual-earner commuting problems, and the like. The question is whether these accommodations should be accomplished through unemployment compensation policy changes or by some broader accommodation requirements, such as those currently applicable to persons with disabilities.[20] To put the matter slightly differently, if the basic issue is the presumptive structure of the labor contract, can changes in those presumptions be made, rather than simply recognized, through the manipulation of unemployment compensation policies?

Finally, on the "big think" side of unemployment compensation reform, there were those who wondered whether we really understand the behavioral effects of experience rating. Perhaps experience rating has problematic benefits and potentially large costs; that is, it may impose modest restraints on employer's decisions to reduce their work forces while simultaneously fueling a "race to the bottom" by the states in terms of unemployment compensation coverage. On the other hand, the current available data is insufficient to demonstrate these effects. Nor is it clear that the elimination of experience rating could avoid other detrimental effects that would more than offset any gains resulting from its abolition.

IV. PERSISTENT ISSUES OF COVERAGE AND ADMINISTRATION: PROBLEMS OF INCLUSION AND EXCLUSION

In some sense, the new problems that face unemployment compensation concerning second earners, low-wage workers, or contingent workers mirror long-term difficulties in unemployment compensation concerning seasonal or part-year workers. In all of these cases, the problem persists of workers who do not necessarily satisfy the historical paradigm of full-time, full-year, single-employer workers with a long and consistent work history. Nevertheless, the history of the exclusion of certain classes of workers from unemployment compensation coverage is quite different from others. Looking at different sets of workers, such as farm workers and

20. *See* 42 U.S.C. § 12,112(b)(5) (Supp. V 1993).

educational employees, teaches one different lessons about the politics and the administration of unemployment compensation.

Farm workers, for example, have long been excluded from unemployment compensation coverage.[21] One can give a plausible and largely ahistorical account that explains this exclusion in terms of the core understanding of covered workers under the unemployment compensation program. After all, farm workers are often seasonal, migratory, or multi-employer workers, who are difficult to fit within the state-administered, employer-financed unemployment compensation scheme. Nevertheless, whatever the plausibility of this ahistorical explanation, it seems quite clear from the public record that farm worker exclusions are actually a part of the politics of race that infected the design of many New Deal programs. The southern Democratic votes necessary to pass the Roosevelt administration's social insurance programs could not have been secured if these programs had upset the economic and, ultimately, the political arrangements of the South in the pre-civil rights era. Aside from the hypothetical reasons offered for their exclusion, it appears that farm workers, in fact, were excluded in order to preserve the power of growers and southern politicians.[22]

From this perspective, the continued exclusion of farm workers in 1996 seemingly preserves a major historical injustice. Many non-farm workers with similar work patterns are covered under unemployment compensation, although not without stress on the system. Thus, historical injustice combines with contemporary anomaly to suggest a straightforward yet unrealized reform.

The explanation for the persistence of the farm workers exclusion is hardly straightforward. It is unclear to what degree it continues to be based on the politics of race, ethnicity, or alienage; to what extent it simply represents the inertial force of the status quo, where opposition to change is well-organized; or the degree to which it is a part of the unique politics of farm policy in the United States with its peculiar economic, social, and political implications. Many administrative issues would pose challenges for the unemployment compensation system if this historically disreputable exclusion

21. Norton & Linder, *supra* note 6, at 180.
22. *See id.* at 195–98.

were removed. Nevertheless, the basic reform issue here appears to be political, rather than technical or administrative.

The administrative challenges of including seasonal workers are highlighted by looking at the current difficulties in implementing unemployment compensation for the employees of educational institutions.[23] Notwithstanding uniform federal criteria and relatively standardized state statutes, there are constant problems in the application of unemployment compensation criteria to the part-year workers employed at most schools and colleges. The basic issue revolves around the underlying expectations concerning academic institutions' employment contracts. If it were clear that academic workers were expected to be employed for nine or ten months of the year, or alternatively, that they generally were expected to be employed full-year, full-time, then the development of an appropriate policy for those who exit during some part of the year because they are not needed would have a reasonably solid foundation. Unfortunately, the expectations are unclear, both across institutions and within them, from the perspective of different types of employees. The result has been considerable administrative confusion. This is a problem that perhaps can be managed more effectively, but it probably will not yield to any elegant solution.

V. SOME ETERNAL VAGARIES AND VERITIES OF ADMINISTRATION

The unemployment compensation system shares with other systems of mass justice, such as the workers compensation system or the Social Security disability system, the poignant need to balance the demands of accuracy, fairness, and timeliness in the adjudication of claims.[24] Moreover, trade-offs are being made in the face of constant demands to economize on administrative costs. Each mass justice system has slightly different pressures and problems in constructing an adjudicatory process in light of these goals and constraints, yet similar generic problems surface repeatedly in all of them.

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23. *See* Maribeth Wilt-Seibert, *Unemployment Compensation for Employees of Educational Institutions: How State Courts Have Created Variations on Federally Mandated Statutory Language*, 29 U. MICH. J.L. REF. 585 (1996).

24. *See* MASHAW, *supra* note 11, at 23–25.

The Symposium participants addressed a host of these issues in the context of unemployment compensation: the role of inquisitorial or "examinational" processes in adjudication;[25] the use of telephone hearings in place of face-to-face encounters;[26] problems of claimant access to representation;[27] the special difficulties of non-English speakers;[28] and the special challenges of timeliness[29] and interstate claims.[30] Cutting across all of these areas is the issue of adequacy of federal oversight of the quality of unemployment compensation administration and the timeliness and efficacy of the generation and enforcement of federal standards.

A. Inquisitions

No one who has been a student of mass administrative processes can doubt the tempestuousness of the marriage between inquisitorial-style processes, which promote speed and professionalism in claims administration, and the ever-present demand for confrontation and cross-examination in cases where motivation, good faith, and veracity are important issues. Virtually all mass justice systems have decided that they are unable to function effectively without the active-adjudicator investigation, informal rules of evidence and procedure, and presiding officer control of issue definition and development that characterize an inquisitorial or examinational approach. These features are then compromised or augmented by the opportunities for representation, confrontation, and cross-examination, creating an uneasy fit among the elements of the administrative hearing process.

These hybrid arrangements have been approved judicially and have been made to function managerially and politically. Yet uneasiness about the hybrid model persists and re-emerges around the issues *de jour* that plague particular systems.

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25. *See* Milligan, *supra* note 10, at 405.
26. Toubman et al., *supra* note 10, at 407.
27. Maurice Emsellem & Monica Halas, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, 29 U. MICH. J.L. REF. 289 (1996).
28. Gillespie & Schneider, *supra* note 10.
29. Dietrich & Rice, *supra* note 10.
30. Mark D. Esterle, *Interstate Claims: Their History and Their Challenges*, 29 U. MICH. J.L. REF. 485 (1996).

The struggle to understand and reconfigure administrative due process is thus a constant as these particular issues change both within and across systems.

B. Telephones

Telephone hearings in the unemployment compensation system are a case in point. These types of proceedings surfaced in response to the difficulties of holding interstate hearings. Many states have turned to the telephone for intrastate hearings, hypothesizing that they are a more cost-effective measure. These efficiency gains may be questionable, however, given the higher appeal rates which seem to attend telephone hearings. And observers are increasingly concerned about the risks of erroneous deprivation that may result from teleconferencing as opposed to face-to-face hearings.[31]

Is this increased risk of deprivation an increased risk of *erroneous* deprivation? That question cannot be answered on the evidence available, although the findings are troubling. For example, in both of the states studied for purposes of this Symposium, the risk of deprivation of unemployment compensation benefits increased while the inputs into hearings, such as the amount of evidence presented, decreased when telephone hearings were used.[32]

C. Representatives

Similar conundra beset the evaluation of claimant representation in unemployment compensation appeals. Data presented at the Symposium suggested that, of one million appeals decided in 1994, nearly two-thirds involved the issue of separation.[33] Forty-five percent of employers were represented in these appeals with no apparent effect on the employers' success rate.[34] Meanwhile, a mere nine percent of employees were represented, but their success rate rose thirty-two

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31. *See* Toubman et al., *supra* note 10, at 456.
32. *Id.* at 449–54.
33. Emsellem & Halas, *supra* note 27, at 290–91.
34. *Id.* at 292.

percent when represented.[35] It is impossible to know whether this increase in claimant success is attributable to the capacity of representatives to make claims appear in their "true" light or whether representatives are simply skilled at selecting those appeals with the best chance of prevailing. Indeed, without an external referent for accuracy, it is even possible that increases in either claimant or employer representation might increase erroneous determinations. It is the advocates' job to make bad claims look good and good claims look bad.

D. Bilingualism

The inconclusiveness of the data is revealed, yet again, with respect to the provision of interpreters or other bilingual services for those who have limited or no English literacy or speaking skills. It is plausible that the lack of bilingual policy materials, notices, staff, or interpreters would disadvantage non-English speakers in the unemployment compensation process. But whether this disadvantage translates into error has not been demonstrated.

Notwithstanding uncertainty about the effects of telephone hearings, lack of representation, or the absence of sufficient bilingual services on error rates, there may be another approach to evaluating the desirability of these particular practices. Changing the policy question from a question of "accuracy" to a question concerning "fairness" or the "appearance of fairness" simplifies the calculation of cost and benefits. Much literature demonstrates that the perception of fairness or legitimacy in adjudicative decision making is highly correlated with the degree to which participants feel that they themselves, or through representatives, have control over the presentation of their claims.[36] From this perspective it may be much easier to suggest that bilingual services and representation are important ingredients of a "fair hearing." Similarly, concerns about the perception of fairness may counsel that telephonic hearing processes should be used only in those

35. *Id.* at 392 n.10.

36. *See generally* John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978) (discussing the truth and justice objectives of dispute resolution as influenced by the distribution of control between the parties and the decision maker).

circumstances where they are voluntarily accepted and where they make some independent contribution to ease of access and timeliness in adjudication.

Other reasons support a shift in focus from accuracy to fairness in evaluating process issues. In many cases, unemployment compensation separation issues resolve into questions of credibility or contextual interpretation. "Truth" is enormously elusive in these contexts. And while we should preserve the truth to the best of our abilities, fairness looms particularly large as a salient value where truth may never be known.[37]

E. Timeliness

All participants in the Symposium argued that, given the purposes of the unemployment compensation program, timeliness is next to godliness in the operation of unemployment compensation adjudicatory processes. The problem, of course, is that when pressures build up on the system because of poor economic conditions, timeliness in performance slips at precisely the time that delay is most costly. The Department of Labor's response to the states' failure to perform in accordance with its timeliness standards received sharp criticism. It was also recognized that funding tends to be inadequate to process claims in accordance with timeliness demands and that, because of the structure of the funding mechanism, funding always lags behind workload rather than anticipating it. A number of recommendations for reform attracted a broad consensus. These included changing the reporting mechanisms to count cases *decided* rather than cases *pending* and the need for intrastate data on pending claims.[38] In both cases the idea is to have a reporting system which will not mask problems or lag too far behind them.

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37. *See generally* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) (elaborating a theory of fairness in procedure based on a particular view of moral agency in a liberal, democratic state).

38. Dietrich & Rice, *supra* note 10, at 266.

VI. REFLECTIONS ON DUE PROCESS AND PROGRAM ADMINISTRATION

The oral discussions and papers presented concerning the adjudication of unemployment compensation claims led this rapporteur to formulate six "iron laws" of benefits program administration, along with six strategies for good adjudicatory administration in the face of those iron laws.

A. Six Unhappy Truths About Benefits Program Administration

First, as most administrators know all too well, the resources needed to accomplish all of the goals specified for particular benefits programs are never available. This is particularly true in adjudicatory activities where cost constraints cause constant trade-offs among the important goals of accuracy, timeliness, and fairness.

Second, the data necessary to understand program operations and to evaluate the effects of reform proposals are never available either. As a consequence, anecdotes and bad data tend to drive most decisions involving program structure and process.

Third, accuracy, timeliness, and fairness are incommensurate goals, even in the absence of scarce resources. Fair opportunity to contest can create smoke screens that obscure relevant information as well as enhance accuracy. Exquisite claims development can hardly ever be timely. And as previously mentioned, conditions of scarcity always obtain.

Fourth, fair and accurate adjudication requires a coherent body of rules and principles, as many authors and commentators at this Symposium were at pains to emphasize. Nevertheless, the unhappy truth is that the rules necessary to unify administration will never all be published. At the federal level, the publication of rules has become the Stalingrad of regulatory warfare.[39] Increased opportunities for participation

39. *See generally* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW &

and legal contest have made the rulemaking process at the state level almost as torpid as its federal analogue.[40]

Although the lack of necessary rules is certainly to be lamented, it is but the flip side of the fifth unhappy truth about program administration: truly comprehensive rules published to unify administration will enormously constrain state adjudicatory discretion. Moreover, because rules always undergeneralize or overgeneralize to some degree, these constraints will result in unreasonable adjudication in addition to coherent and consistent decisions. Rulishness is a double-edged sword. Getting the balance right between clear decisional criteria and appropriate discretion, "all things considered," is a labor of Hercules.

Finally, federal oversight and enforcement is presumed to be a part of virtually all state-federal programs. Yet, national level oversight and enforcement will almost always founder on the shoals of federal-state political relations.[41] An inherent ambiguity in federal-state programs concerning the responsibilities of relevant actors is built into the programs, and it is an extremely persistent obstacle to federal "policing" of state systems. Calls for better federal oversight and enforcement may be justified, but it is not wise to stake program success on its existence or persistence over time.

B. Six Strategies for Managing in the Face of Immutable Adversities

Notwithstanding these "unhappy truths" or "iron laws," there are strategies for good adjudicatory administration given highly adverse circumstances. In my view these strategies include at the least the following:

First, recognize that "error" is a metaphysical concept. There is no external proxy or standard for a correct decision against

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CONTEMP. PROBS. 185 (1994) (analyzing the decline of rulemaking and its causes).

40. *See* Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 56 (1992) (advocating that compliance with California's nonlegislative rulemaking procedure creates significant costs and delays).

41. *Cf.* Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 13–22 (1973) (describing similar problems in the quite different context of federally aided highway construction).

which real decisions can be measured. One often hears calls for increased vigilance concerning accuracy based on findings of variance across decisions, either at the same or different levels of the adjudicatory process, changes in win-loss rates over time, or variance in the inputs to processes that presumably affect the accuracy of decisions. None of these indications that something may be amiss are the same as determining that errors are being made. Hence, these claims should be viewed with some degree of skepticism.

The elusiveness of accuracy suggests that good program administration should directly confront the difficulties of operationalizing program values in the construction of good quality assurance systems—systems that pursue the multiple values of accuracy, timeliness, and fairness.[42] That we will never have perfect proxies for or perfect measures of these values is not an indication that we should do nothing to manage systems to optimize their achievement. Excellent quality assurance systems have been designed and are used in a number of large benefits programs. Social security and veterans' benefits programs have been pioneers in these efforts. In some areas, public assistance and Medicaid, for example, such programs are controversial because they have been implemented in a skewed fashion. It is critical that quality reviewers be equally concerned with false positives as with false negatives and as attentive to potential fairness issues as to more easily measured dimensions of claim quality such as timeliness. This is not beyond the wit or will of good managers.

Quality assurance is also controversial because it identifies problems and seeks solutions.[43] Sometimes those problems are embarrassing to administrators, and sometimes the solutions require that adjudicators receive differing instructions, additional training, or even disciplinary action. This leads predictably to claims of invasion of adjudicatory independence. It should be remembered, however, that the independence

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42. *Cf.* 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, 775–76 (1974) (urging internal managerial control as a substitute for defective external legal supervision).

43. *See generally* Jerry L. Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823 (1980) (defending the need to review the process and products of administrative law judge adjudications).

accorded adjudicators is for the benefit of claimants and other affected parties. It is not an independent right of adjudicators to act with autonomy, whatever the programmatic consequences. I do not believe it too harsh to say that anyone who claims that their independence is jeopardized by a well-constructed quality assurance system is, at best, confused and should be ignored. On the other hand, adjudicators rightly fear poorly constructed quality control efforts and the abuse of good systems, if adjudicator independence has not been properly assured in other ways.

A fourth strategy for good administration is to avoid waiting for Godot. Here Godot represents rules from above that will rationalize the system and avoid difficult interpretive decision making. No matter how many times we watch Samuel Beckett's play, Godot will never appear. And no matter how many times we beg for better rules from above, we will always find that there are major gaps in the instructions available. Ground level administrators must do their jobs as best they can in accordance with basic program values. This argues for stepping back from technical detail and thinking carefully about the principles that underlie the program in question. Broad principles and an appropriate adjudicatory culture can substitute for missing rules—and sometimes do a better job in the bargain.

Fifth, I would urge that program administrators need not always wait for the data necessary to reform their programs. Problems often can be redefined to economize on information demands. An example was discussed earlier in the move from a focus on the effects of representation, telephone hearings, and bilingual aids on accuracy, to a focus on fairness or other symbolic values. If effects on accuracy are unknowable but fairness or timeliness seems in jeopardy, or vice versa, the program administrator should act to remedy known difficulties.

Finally, I hasten to add that the preceding comment is not a call for abandoning the pursuit of good data. Although some of the papers presented at this Symposium were unable to launch the major studies that would be necessary to answer the important questions that they raised, concerted effort over time is likely to yield more definitive results. Hence, good administration includes the pursuit of serious research on the relationship between programmatic inputs and outputs. The results of this research may not be available with the speed

necessary to address all of today's problems. Nevertheless, when good studies are done it is generally the case that, someday, somebody will use them. I take it that this faith underlies much of the work of the Advisory Council on Unemployment Compensation and was in part the motivation for convening this excellent Symposium.