Beyond Java: Redistribution of Risks in the Administration of Unemployment Insurance

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I. INTRODUCTION

Congress established unemployment compensation programs "to provide a substitute for wages lost during a period of unemployment not the fault of the employee."¹ The objective was to enable workers "to tide themselves over, until they get back to their old work or find other employment without having to resort to relief."² To insure that a claimant does not have to resort to relief, benefit payments must be promptly initiated.³ Thus the Social Security Act includes a requirement that participating state unemployment compensation programs must be designed to insure full payment of benefits "when due."⁴

There is, however, considerable difficulty in reconciling delayed payment under the present administrative appeal system with this congressional objective. This goal received renewed recognition and support by the Supreme Court in California Department of Human Resources Development v. Java,⁵ which held that the summary suspension of a claimant's unemployment compensation benefits pending an administrative appeal by his employer created a delay in benefit payments that violated the purposes of the Social Security Act. After Java, the employee who is found qualified at the initial

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¹ California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 130 (1971).


³ At the time the Social Security Act was passed, it was estimated that there would normally be a 2-week waiting period with 4 weeks as the outer limit. See Hearings on S. 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess. 1319, 1321 (1935).


⁵ 402 U.S. 121 (1971).
determination level will receive benefits which cannot be suspended merely because his employer decides to appeal.

There are several open issues and other difficulties, however, which this article will examine. Using a risk allocation analysis of unemployment compensation, it becomes apparent that the qualified claimant inequitably bears all the risk and absorbs the entire financial impact of an erroneous decision at the initial determination. In some states, if there is an initial determination against the claimant, he may have to prevail at two separate appellate levels before benefit payments will begin. Even when the claimant is found qualified initially, there is a weekly reverification process in which the claimant may be erroneously disqualified. If this occurs, he must go through the normal appellate procedures and delays to restore benefit payments. It is the contention of the authors that these problems can be substantially reduced or eliminated by the adoption of recommendations presented in this article.

II. STANDARDS FOR APPLICATION OF THE CONCEPTS OF RISK AND ENTITLEMENT

Commentators have long recognized that "[t]he common denominator in all social welfare programs and protections is the factor of vulnerability to a socially recognized risk" and that "the present provisions of American welfare law . . . are centered around specific risks and each carries conditions of entitlement related to that particular risk." The legal issues currently being presented to the courts can be described as a twofold quest by claimants of unemployment compensation for prompt recognition of their entitlement to benefits, and for an equitable distribution of the risk of improper denial of benefits. These claimant expectations are supported by the general purposes of the unemployment insurance provisions of the Social Security Act—particularly the provision requiring methods of administration "to be reasonably calculated to insure full payment of unemployment compensation when due."

Reference to general principles of social insurance, risk distribution, and statutory entitlement is necessary to establish standards by which the courts and legislatures can measure the effectiveness of

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7 Id. at 521.
the administration of unemployment insurance. The unemployment compensation system is usually described as a system of social insurance designed to protect the individual and society against the effects of unemployment. In many respects, however, it is unlike other systems of social insurance, particularly in its manner of financing. Unemployment compensation funds are derived from individual employers, often at rates varying with the experience rating of a particular employer and the experience rating formula applied by his state.\(^9\) In contrast, other social insurance programs are financed either from the general revenues of a political entity, as are public assistance programs and farm subsidies, or from a broad spectrum of the population, as is Old Age and Survivors Disability Insurance.

Unemployment compensation has many features that would categorize it as an "enterprise liability" form of social insurance.\(^10\) The underlying premise of enterprise liability is "the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault . . . ."\(^11\) Assuming that enterprise-related unemployment losses fall into this category, enterprise liability is justified by the economic postulate that a free enterprise system demands accurate cost allocation to allow the buyer to make informed decisions based on the actual costs of competing products.\(^12\)

To assess the degree to which the administration of the unemployment compensation system meets the standards of an effective system for the allocation of risk of loss from enterprise-related unemployment, it is necessary to consider the following requirements of accurate cost allocation: (1) the costs of injuries should be borne by the activities which cause them;\(^13\) (2) the initial burden of a loss should be allocated to the party in the best position to insure that those costs will be reflected in the price of the product;\(^14\) and (3) the cost of distribution of benefits should be borne by the party whose insurance costs are lower.\(^15\)

These principles are reflected in the statutory structure of the Social Security Act. As the Supreme Court emphasized in *Java,*

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9 See note 38 infra.


12 *Id.* at 502.

13 *Id.* at 505.

14 *Id.* at 506-07.

15 *Id.* at 506.
minimizing the impact of loss of employment is central to the purposes of the Act. For example, the taxing mechanism is designed to spread the risk of loss by shifting the initial burden of that risk from the employee to the employer and by extending the risk over a period of time. In addition, devices such as experience ratings, which act as disincentives to employee layoffs, are intended to minimize the amount of loss.

While extensive commentary has been devoted to this broad federal statutory framework and the extent to which the eligibility and tax structure accomplish their stated goals, relatively little discussion has focused on the question of whether the administrative process created by the states serves those same ends. In analyzing this question we shall use several general guidelines. First, we must consider whether any aspect of the administrative process "conflicts with, or adversely affects the impact of the ethical import of unemployment compensation"—that "payment be made to an eligible claimant as a matter of right." If there is a conflict, we must then decide whether the adverse impact is nonetheless justifiable because the administrative practice is essential to the determination of whether the claimant's unemployment is within the risks that the unemployment compensation laws are designed to cover, "involuntary unemployment due to economic conditions," and because that

16 402 U.S. at 131-33; see text accompanying notes 42-44 infra.
17 See note 38 infra.
19 Generally such discussion emphasizes the possibility of fraud by claimants in the distribution of benefits. See, e.g., Becker, The Problem of Abuse in Unemployment Benefits, in SPECIAL COMM. ON UNEMPLOYMENT PROBLEMS, supra note 18, at 1412.
20 These standards have been adopted from Note, Charity Versus Social Insurance in Unemployment Compensation Laws, 73 YALE L.J. 357 (1963).
21 Id. at 388.
22 Id. at 359.
23 Id. at 373.
practice is on an average the least onerous alternative. Finally, we must consider "whether reasonable safeguards have been provided to minimize its adverse impact on the ethical import of unemployment compensation." 24

III. Java and a Typical State
Unemployment Insurance Program

Since current litigation and debate about state unemployment insurance programs concern issues first raised by the Supreme Court in Java, we commence our discussion with that case. The two plaintiffs in Java, having lost their jobs, filed claims with the California Department of Human Resources Development. Prior to losing their jobs, the plaintiffs had earned sufficient wages in employment covered by the California unemployment insurance program to qualify for the receipt of benefits. After an eligibility investigation, the claimants began receiving weekly benefits. Shortly thereafter, their former employers appealed the determinations to a state referee. Pursuant to section 1335 of the California Unemployment Insurance Code, 25 no further payments were permitted pending decisions on appeal, even though the Department's favorable determinations remained unchanged. In the interim both claimants were forced to apply for public assistance in order to support their dependent children.

Prior to the referee hearings, the claimants instituted a class action in federal district court to enjoin the enforcement of section 1335 on the grounds that the statute was unconstitutional and inconsistent with the requirements and purposes of sections 303(a)(1) and 303(a)(3) of the Social Security Act. 26 A three-judge court issued a preliminary injunction enjoining the state from sus-

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24 Id. at 388.
26 42 U.S.C. §§ 501-03 (1970) determine how money to assist states in the administration of their unemployment compensation programs is to be provided. Sections 503(a)(1) and (3), the sections most pertinent to Java and to this article, provide:
   The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for —
   (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and
   . . .
   (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . .
pending the unemployment benefits of recipients. It held that section 1335 deprived claimants of benefits without a prior hearing in violation of the due process requirements set forth in Goldberg v. Kelly\textsuperscript{27} and that the seven week delay in payments violated the "when due" provision of the Social Security Act.\textsuperscript{28} The Supreme Court unanimously affirmed the lower court's decision. The Court, however, found it unnecessary to reach the due process issue because it agreed with the lower court holding that section 1335 of the California Unemployment Insurance Code conflicted with the requirements of section 303(a)(1) of the Social Security Act.\textsuperscript{29}

In many respects, California's unemployment insurance program represents a typical state system. As in the other states,\textsuperscript{30} California's program receives financial support from the federal government in the form of tax and fiscal benefits pursuant to the Social Security Act.\textsuperscript{31} No grant may be made to a state unless the Secretary of Labor certifies the amount to be paid,\textsuperscript{32} and certification is conditional upon his finding that the state's program conforms to federal requirements.\textsuperscript{33}

\begin{enumerate}
\item \textsuperscript{27} 397 U.S. 254 (1970).
\item \textsuperscript{28} Java v. California Dep't of Human Resources Dev., 317 F. Supp. 875 (N.D. Cal. 1970).
\item \textsuperscript{29} 402 U.S. at 122.
\item \textsuperscript{30} All 50 states, the District of Columbia, and the Commonwealth of Puerto Rico have enacted unemployment insurance programs. See U.S. DEP'T OF LABOR, MANPOWER ADMINISTRATION, BUREAU OF EMPLOYMENT SECURITY, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 1-1 to 1-23 (1972 ed.) [hereinafter cited as CSUIL].
\item \textsuperscript{31} 42 U.S.C. §§ 501-03, 1101-05 (1970). These benefits are substantial. In 1968, for example, California received $90,085,000 from the Federal Unemployment Insurance Program as reimbursement for administrative costs. U.S. STATISTICAL ABSTRACT table 571, at 384 (1970).
\item There are significant tax benefits realized by the employer as well. Most employers are required by the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-09 (1970), to pay into the Treasury an excise tax on the first $4,200 of each employee's annual wages. The taxes so collected are later transferred from the Treasury to the Federal Unemployment Trust Fund for credit to the employment security administration account — out of which the states are reimbursed for administrative expenses. 42 U.S.C. § 1101(b)(1) (1970).
\item Employers who are subject to state unemployment compensation laws may credit their contributions to the state programs against the federal excise tax. Full use of the credit can reduce the tax from the 1973 rate of 3.28 percent to an effective rate of 0.58 percent. For an explanation of the tax and credit see 1A UNEMPL. INS. REP. §§ 20,003-60 (1973).
\item As the Court stated in upholding the constitutionality of the unemployment compensation program. "What they [the states] may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be
In order to be eligible for benefits, a claimant is required to have earned a specific amount of wages during his base period. Benefits are paid from the state employment fund, which consists of funds collected from private employers and money credited to the state’s account in the Federal Unemployment Trust Fund pursuant to statute. An individual employer’s rate of contribution to the fund is determined by each state and to some extent is based upon his experience rating.

The determination process—the process whereby validity of the unemployed worker’s initial claim is determined by the state—is for the most part uniform throughout the various unemployment com-

34 CAL. UNEMPL. INS. CODE § 1281 (West 1972). Because the Social Security Act incorporates no standards for benefits in the unemployment insurance system, the states have developed varying formulas for determining workers’ benefit rights. In all of the state programs, however, a worker’s benefit rights depend upon his experience in covered employment in a past period of time called the “base period.” The period during which the worker is entitled to the benefits at the established rate is called the “benefit year.” In order to qualify for benefits, the claimant must have earned a specific amount of wages or have worked a certain number of quarters or weeks in covered employment within the base period, or have done both. The range of the amount of earned base period wages required in order to be eligible for minimum benefits varies from $150 (Puerto Rico and Hawaii) to $1,200 (Washington). The median is approximately $500. Id. at 3-27 to 3-29 (rev. Jan. 1973).

35 CAL. UNEMPL. INS. CODE § 976 (West 1972). The states finance the unemployment funds primarily through contributions from subject employers on the wages of their covered employees. The funds collected are held for the states in the Federal Unemployment Trust Fund. It is from this fund that money is drawn to pay benefits and to refund contributions erroneously paid. Each state determines its own rate of contribution. In most states, the standard rate — i.e., the rate required of employers until they are qualified for a rate based on their experience — is 2.7 percent, the maximum credit allowed by the Federal Unemployment Tax Act. CSUII at 2-1. See note 31 supra.


38 All state programs use some system of experience rating by which the employers’ contribution rates are varied from the standard rate on the basis of their experience with the risk of unemployment. CSUII at 2-4 (rev. Jan. 1973). Although the experience rating formulas incorporated in the various state laws differ widely, there are certain characteristics common to all of the state programs.

All formulas are devised to establish the relative experience of individual employers with unemployment or with benefit costs. To this end, all have factors for measuring each employer’s experience with unemployment or benefit expenditures, and all compare this experience with a measure of exposure — usually payrolls — to establish the relative experience of large and small employers.

Id. at 2-5. For a description of the five systems of experience ratings employed by the states see id. at 2-5 to 2-7.
pensation programs in the 50 states and the District of Columbia.\textsuperscript{39} The California initial determination process, described in detail in \textit{Java},\textsuperscript{40} commences when the claimant files for benefits at a local state office by providing information concerning his last employer, the reasons for his separation from employment, and his work experience. The employer is notified of the claim and must, within 10 days, submit any facts that may affect the claimant's eligibility for benefits. The claimant is informed that he must serve a waiting period consisting of the first week of unemployment, during which he receives no payment.\textsuperscript{41} He is then instructed to return during the third week for a second, more complete interview to determine his eligibility. The loser, whether claimant or employer, can appeal the determination. When the claimant was successful and the employer appealed, the pre-\textit{Java} practice in California was to delay payment pending the outcome of the appeal.

The Court noted in \textit{Java} that this practice forced the claimant to wait seven to 10 weeks before receiving any benefits. It determined the legislative history of section 301(a)(1) of the Social Security Act supported the conclusion that "full payment of unemployment compensation when due" was intended to mean "at the earliest stage of unemployment that such [benefit] payments were administratively feasible after giving both the worker and the employer an opportunity to be heard."\textsuperscript{42} The Court stated that Congress intended unemployment compensation as a prompt replacement of wages to the newly unemployed worker both to provide subsistence while he sought new employment and to prevent him from resorting to welfare.\textsuperscript{43} In addition to benefiting the individual worker, prompt payments would also have a stabilizing influence on the national economy in that consumer purchasing power would be maintained during the period of unemployment.\textsuperscript{44} California's procedures were held to be unlawful because they frustrated these congressional objectives. The time within which a claimant receives money due him

\textsuperscript{39} See 1B UNEMPL. INS. REP. § 2020, at 4541-43 (1971). For a compilation of all of the state programs see \textit{id.} \textsuperscript{99} 3000-62 (1972).
\textsuperscript{40} 402 U.S. at 125-29. See also the district court opinion, 317 F. Supp. at 877-78.
\textsuperscript{41} In all states except Alabama, Connecticut, Delaware, Kentucky, Maryland, Nevada, and New Hampshire, the first week is a noncompensable period of unemployment in which the claimant must have been otherwise eligible for benefits. \textit{See CSUIL at 3-5, 3-6 (rev. Jan. 1973).}
\textsuperscript{42} 402 U.S. at 133.
\textsuperscript{43} \textit{Id.} at 131. \textit{See also H.R. REP. NO. 615, 74th Cong., 1st Sess. 7 (1935).}
\textsuperscript{44} 402 U.S. at 132. \textit{See also Hearings on S. 1130 Before the Senate Committee on Finance, 74th Cong., 1st Sess. 1-6 (1935) (statement of Robert Wagner).}
thus emerges as a crucial factor in determining the validity of any unemployment insurance scheme. Although Java dealt only with a time lapse at the stage of a first appeal, the question of undue delays at other points in the claims process and of their effect on the validity of the state system is apparent.

**IV. ANALYSIS OF POST-Java ISSUES**

A. **Payment After Victory**

The United States Department of Labor\(^4\)\(^5\) and a recent case on the issue\(^6\) have interpreted the rationale of Java as entitling the claimant to payment after he prevails at any stage of the hearing process. Thus, payment would seem to be "due" the claimant who

\(^4\) The United States Department of Labor has issued a letter evidently intended to effectuate both the spirit and specific holding of Java. With one exception, it extends the Java rationale to any decision favorable to the claimant at any stage of the administrative process and would seem therefore to resolve most of the issues involved in payment after victory. The letter states in part:

**VIII. Payment of Benefits During Investigation, Determination, Redetermination and Appeals (Including Higher Authority)**

A. Under the Java decision benefits allowed in an initial determination may not be withheld by reason of the pendency of the appeal period or of an appeal.

B. In addition, the reasoning of the Court in the Java decision supports the payment of benefits as indicated below.

1. **Redeterminations**

Since practices vary so widely among the States, the following covers only the most common kinds of redeterminations:

(a) When a claimant was initially found ineligible and another interested party is involved, notice and opportunity to be heard in a predetermination proceeding must be offered both parties before a redetermination can be made. No benefits may be paid until the redetermination is completed and then benefits are to be paid immediately or denied, according to the redetermination.

(b) When a claimant was initially found eligible, notice and opportunity to be heard must be afforded to the claimant and any other interested party before a redetermination can be made that could modify or reverse that initial determination. In the meantime benefits may not be withheld. Benefits will be paid or denied upon the issuance of the redetermination and in accordance therewith.

2. **Appeals**

Except as it may be precluded by a "double affirmance" provision in the state law, an appeal decision should be given immediate effect when it is issued and benefits should be paid or denied in accordance with it regardless of the issue involved or previous determinations and decisions and regardless of the fact that a further appeal may be taken.

3. **Payment of Benefits for Weeks Not in Dispute**

In the case of an appeal, it has been the practice to pay benefits only for weeks "not in dispute." For example, in a voluntary-quit case where State law provides a variable 1-to-6 week disqualification, and a 3-week disqualification has been assessed, benefits would be withheld for 6 weeks, because the appeal decision could result in increasing the disqualification. The reason-
prevails either at the initial determination or at any one of the appellate proceedings.\(^7\)

The administrative reconsideration, of which all interested parties are notified, may be based solely on the factual record compiled at the initial determination. It may, however, include additional facts submitted by the parties, uncovered by the local office in a renewed fact-finding process, or obtained by the examiner. Thus, at a minimum, reconsideration can be viewed as a supervisory extension of the initial determination and is entitled to at least the same importance and protection as that provided to the first determination under the Java standards. The additional input of new evidence and information at the reconsideration level adds weight to the argument that payment must be made promptly upon the rendering of that decision and not be stayed pending further appeal.

Since the investigatory and determinative processes become progressively more refined as the claimant moves through the appellate process, the arguments favoring payment become even more compelling after a favorable decision at each successive level of appeal.\(^8\) Fact-gathering and use of evidence at the hearings, although not bound by strict rules of evidence, are highly formal in contrast to the expedited and often incomplete investigative process used in the initial determination and the administrative reconsideration. The

\(^7\) United States Dep't of Labor Unemployment Insurance Program Letter No. 1145, at 18-19, Nov. 12, 1971 (footnotes omitted).

\(^8\) Crawford v. Games, IA UNEMPL. INS. REP. 21,385 (N.D. Ohio 1972).

\(^7\) The benefit appeals procedure differs from state to state. Some states permit an administrative reconsideration following the initial decision, and a few (Idaho, Michigan and Ohio) require a redetermination before an appeal can be taken. All states provide for a lower level administrative appeal, usually in the form of a referee hearing. Most states provide for an upper level administrative hearing, which in about one-half the states takes the form of a 3-member board of review or appeals board. All states then provide for resort to a state court of general jurisdiction. For a discussion of the various appeals procedures see CSUIL at 5-4 to 5-6 (rev. Jan. 1973) and 1B UNEMPL. INS. REP. § 2020 (1972).

\(^8\) In Ohio, the amount of time allocated per case for the hearing process is approximately 14 times greater than that allocated to either the initial determination or the administrative reconsideration. (655 minutes for the referee hearing and the Board of Review hearing, compared to 45 minutes for the initial determination and administrative reconsideration): Telephone interview with Beman Pound, Director, Unemployment Compensation Division, Ohio Bureau of Employment Services, on Aug. 10, 1972. In addition, the financial resources allocated to the reconsideration hearing process are much greater than for the initial hearing because of the higher salary range for attorney hearing examiners. Interview with Don Allman, Claims Manager, Toledo Area Office, in Toledo, Ohio, Aug. 7, 1972, by Thomas Willging.
hearings are conducted by a referee, who in many state programs is an attorney, the parties are sometimes represented by counsel, a record is maintained, the parties are available for confrontation and cross-examination, and the subpoena power is more easily exercised. The greater time allocation per case and the more efficient fact-finding ability at the hearing level indicate that the decisions at that level should be more reasoned and enlightened than those of the initial determination or the reconsideration.

We recognize, as did the court in *Crawford v. Garnes*, that a corollary of the "payment after victory" rule is "nonpayment after defeat." The only point at which this rule would be questionable is when an initial determination of eligibility is reversed at the administrative reconsideration level. Such a reversal denies an established statutory entitlement without the benefit of an opportunity to be heard other than by written submission. This procedure may be constitutionally inadequate to protect the interests of individuals who are often unskilled in the art of writing and who have little expertise in the often complicated area of unemployment insurance law.

Standards of risk distribution also compel payment to a claimant victorious in the appeal stages of the process. The risks involved are that the claimant will not be given payment at the time that his need is the greatest in terms of the purposes of the act (minimization of unemployment, maintenance of consumer purchasing power, and avoidance of dependence on welfare), or that an overpayment will be issued and the state's reserve account in the unemployment compensation fund will be unfairly charged. The low-income, low-asset claimant does not have sufficient reserves to absorb the cost of delay and to engage in the activities that the statute seeks to promote (search for employment, consumption of goods and services, and avoidance of welfare). Welfare payments are often not available promptly enough, or in sufficient amount, to meet the emergencies created by loss of employment. The consequences of failing to immediately compensate the victorious claimant are twofold: First, the economic burdens will be borne by the individual or by society; and second, the burden cannot be completely remedied by payment at a later time. The economic harm is by definition immediate.

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49 1A UNEMPL. INS. REP. ¶ 21,385 (N.D. Ohio 1972).
The reserve account of the unemployment compensation fund is in a better position than the individual claimant to absorb the costs of delay. Several techniques are available to reduce the possibility of loss caused by delay and to redress loss in the event of overpayment. The Java Court specifically cited two devices to minimize losses. First it suggested recoupment of overpayments either by an offset against future claims for benefits or by civil action.\(^5\) The use of civil actions would permit a beneficial distinction to be drawn between those claimants with substantial assets and those who are judgment-proof. This procedure would also avoid the negative aspects of the offset device, that is, the anomalous result that overpayments might be recovered at a future time when the claimant is properly entitled to benefits.

The Java court's second suggested method of minimizing losses is mutualization of overpayment. Mutualization would avoid the injustice of imposing the entire cost of overpayment on the employer of a claimant who erroneously received benefits.\(^5\) Mutualization spreads the risk of overpayment among all the covered employers within a state,\(^5\) and therefore indirectly among all the covered employees of the state under the theory that unemployment insurance is an earned fringe benefit which is part of the labor costs of business. Mutualization is accomplished at minimal additional expense in that the fixed costs of collecting the funds are necessary to the creation of the overall unemployment insurance fund. The incremental cost of establishing and administering a mutualized fund is also undoubtedly less than the alternative of employees creating a new fund to cover the specialized risk of overpayment.

The principle of “payment after victory” is subject to troublesome exceptions in states that have the so-called “double affirmance” rule, requiring the claimant who initially loses to prevail at two appellate stages of the unemployment insurance process before benefits are payable.\(^5\) This rule is recognized as an exception to the

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\(^5\) 402 U.S. at 129 n.8.
\(^5\) 402 U.S. at 135-36 n.19 (Douglas, J. concurring).
\(^5\) Unless there is such mutualization, the employer would be adversely affected by the reduction in his insurance fund and the consequent change in his experience rating and tax level. We anticipate that those states which do not now provide for mutualization will amend their statutes to meet the increased need for mutualization created by the Java decision.
\(^5\) See, e.g., TEXAS REV. CIV. STAT. ANN. art. 5221b-4(b) (1971). Since the Java decision, however, the legality of this rule is questionable.
“payment after victory” principle by the Department of Labor.55 “Double affirmance” appears to be contrary to the rationale of Java, which would seem to support a finding of statutory entitlement whenever a determination is made in favor of the claimant.

In summary, we can say that both the Department of Labor, despite its recognition of the “double affirmance” exception, and the Crawford decision, in extending Java to decisions after the initial determination, are based on sound principles of risk distribution.

B. Continued Claims Cases — Who Should Pay

A claimant prevailing at the initial determination must meet certain conditions if he is to continue receiving benefits. State laws require that a claimant in the continued claim category: (1) register in person each week during which he is claiming benefits;56 (2) be able to work and available for suitable work;57 and (3) actively seek work.58 If a recipient’s benefits are terminated for failure to meet these conditions, he may appeal the decision by the same procedure (reconsideration, referee appeal, etc.) as one who was initially determined ineligible. A key question is whether a state’s summary termination or suspension of the unemployment benefits of a recipient in the continued claims category violates the due process clause of the fourteenth amendment and the “when due” provisions of section 303(a)(3) of the Social Security Act.

1. Due Process.— Crow v. California Department of Human Resources Development59 was the first case to hold that a recipient has the due process right to a fair hearing prior to the termination of his benefits because of an alleged refusal to accept suitable work. A similar decision was reached in Wheeler v. Vermont,60 where the district court stated that

unemployment compensation benefits cannot be treated differently from the welfare benefits in Goldberg v. Kelly; the right to wages free from prejudgment attachment protected in Sniadach v. Family Finance Corporation; the right to a tax exemption granted in Speiser v. Randall; and the right to public employment articulated in Slochower v. Board of Higher Education.61

55 See note 45 supra.
57 See, e.g., id. § 4141.29(A)(4).
58 Id.
61 Id. at 861 (citations omitted).
The *Wheeler* court specifically rejected a contrary view asserted by yet another three-judge district court. Writing for a two-to-one majority in *Torres v. New York State Department of Labor*, Circuit Judge Paul R. Hays distinguished unemployment compensation claimants from the welfare recipient of *Goldberg*, and held that since in the case of the former there is an "absence of the 'brutal need' on which the court rested its decision in *Goldberg*, the government interests to which the Court referred must be held to outweigh plaintiffs' claim." The *Torres* court noted that the eligibility criterion for unemployment compensation is not need, as it is for Aid for Dependent Children and Home Relief, and that unemployment compensation claimants denied relief could resort to welfare if they could show the requisite need.

On appeal, the Supreme Court did not reach the merits, but instead remanded *Torres* for reconsideration of the statutory issue in light of its opinion in *Java*. The district court found *Java* distinguishable and, in a per curiam opinion, adhered to its prior decision upholding the New York termination procedure. The Supreme Court summarily affirmed without the benefit of full briefing or oral argument, and without opinion. Shortly thereafter, however, the Court noted probable jurisdiction in *Indiana Employment Security Division v. Burney*, a case presenting issues identical to those in *Torres*. The district court in *Burney* had found that an Indiana statute permitting termination, withholding, or reduction of benefits "because of an administrative determination of ineligibility after an original determination of eligibility," frustrated the purposes of section 303(a)(1) of the Social Security Act. The lower court did not reach the due process issue which at least three Supreme Court Justices would probably consider controlling.

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63 321 F. Supp. at 437.
64 Id.
70 Id. at 223.
With Burney pending, the Court held a petition for rehearing in Torres in abeyance, and thus gave every indication that a final ruling upon the legality of prehearing suspensions of unemployment compensation benefits would come in Burney and that the petition for the rehearing in Torres would be disposed of in accordance with that decision. This seemingly logical prediction has proven false; the Court has instead disposed of Torres in a fashion that Mr. Justice Marshall has aptly characterized as “bizarre.” Subsequent to their respective district court cases, the claimants in both Burney and Torres were given full post-termination hearings on the merits of these claims. Termination of Mrs. Burney’s benefits was reversed and termination of Mr. Torres' benefits was reaffirmed. Thus at the time each case reached the Supreme Court, neither claimant was suffering a denial of due process or being denied benefits “when due.” If mootness was a possibility, it was equally possible in both cases. The Supreme Court apparently discerned an “inarticulated” distinction between the cases, however, and remanded Burney for possible mootness and then simply denied the petition for a rehearing in Torres in a memorandum opinion. The Court has since denied a petition for rehearing on its decision to remand Burney for mootness. Though Mr. Justice Marshall’s compelling dissents to the remand in Burney and to the denial of rehearing in Torres offer the only

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73 Id.
74 Id.
75 Id.
79 409 U.S. at 542.
80 Mr. Justice Marshall’s dissent, joined by Mr. Justice Brennan and Mr. Justice Douglas, is nothing less than vitriolic:

By summarily denying this petition for rehearing, the Court finally disposes of important issues of constitutional law and statutory construction in a fashion which can only be characterized as bizarre. Although the case has now been before us on three separate occasions, by [sic] Brethren have yet to write so much as a single word in defense of a disposition which is seemingly inconsistent with a raft of our prior cases [citing Burney, Java, and Goldberg]. I cannot concur in this cavalier treatment of a question that is of vital importance to the thousands of citizens who, through no fault of their own, are temporarily unemployed.

... [E]ven if I accepted the Court’s unarticulated conclusion that this case is distinguishable from Burney, I would still object to the summary fashion in which the District Court is affirmed today. ... [I]ssues which in Burney
articulation of policy in face of a consistently silent majority, they have no authoritative value and therefore posit only speculative explanation of the majority's actions. Some speculation beyond Mr. Justice Marshall's complaint of inarticulated distinctions is, however, possible. It may be that a majority of the Justices are simply unwilling to settle the continued claims issue left open by Java at this time. Or, the majority may be awaiting an opportunity to reverse an unmoot Burney and to adopt Judge Hays' Torres reasoning in a full opinion. On the other hand, there are significant factual distinctions between Torres and Burney. Despite the fact that the three-judge district court's second opinion in Torres re-affirmed the first, the court's characterization of the facts in its second opinion indicated that the New York procedure under consideration did not involve summary termination of benefits. Although termination was not preceded by a full-scale Goldberg style hearing, both plaintiffs were asked for information about their activities, and both were given opportunities to clarify their situations before decisions were made. As the second Torres opinion stated: "The suspension of benefits was, therefore, not an automatic consequence of Torres' employer's action, nor was it made without a hearing." The district court in Burney, on the other hand, found a summary termination of benefits without a satisfactory hearing.

A possibility exists, therefore, that the Court was satisfied with the termination procedure followed in Torres and saw no reason to discuss the district court decision any further. If this is the case, the Court may be awaiting an appeal from an unmooted Burney to delineate a due process requirement of a limited pretermination hearing of the sort found in Torres and to thus limit the application of the welfare due process requirements of Goldberg in the area of unemployment compensation. It is also possible that the Court will

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were considered so significant as to require setting the case for argument have now, inexplicably, become so trivial as not even to require an opinion. It is not without irony that petitioners, who claim a deprivation of due process because vital benefits are denied them without a hearing, are unable to secure a hearing before this Court.

I would have thought that if the rights recognized in Goldberg and Java were to be sharply limited, the Court would at least have found it necessary to explicate the basis for this limitation and delineate the new reach of those new decisions.

93 S. Ct. at 1446-48.

81 See text accompanying notes 62-64 supra.

82 333 F. Supp. at 344.

83 347 F. Supp. at 223.
reverse or even ignore its memorandum opinions in Torres and affirm the lower court in Burney.

In light of such uncertainty, critical analysis of the lower court's ruling in Torres is in order. It should first be noted that the two primary constitutional arguments raised by the first Torres decision — i.e. that Goldberg can be distinguished because it involved welfare benefits which, unlike unemployment benefits, relieve a "brutal need," and that state interests in reducing administrative costs outweigh the interests of the claimant — have been soundly discredited by the Supreme Court in its latest amplification of Goldberg. In Fuentes v. Shevin, which held that procedural due process requires an opportunity for a hearing before chattels can be taken from an individual in a state-sanctioned replevin proceeding, the Court rejected a reading of Goldberg that would limit its application to denials of "necessities." Pointing to Bell v. Burson, which held that there must be an opportunity for a hearing before suspension of a driver's license, the Fuentes Court stressed that due process protection goes far beyond "necessities," and to some extent beyond traditional "property" concepts.

Furthermore, there is serious doubt that the first Torres court was correct in characterizing unemployment benefits as qualitatively different from welfare benefits. As Judge Morris Lasker noted in his dissent in the first Torres opinion, "there are often cases in which, because of delay in the administrative process and personal lack of resources, those deprived of unemployment compensation are in dire straits." Although after Goldberg and Fuentes the importance of

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86 "[I]f the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions." Id. at 90.


89 321 F. Supp. at 439 (Lasker, J., dissenting). The Wheeler court also criticized the majority view in Torres:

The fact that unemployment benefits are paid without reference to need, that is to say, without reference to a means test, does not mean that a given claimant's need is qualitatively different from a welfare recipient. While such need may from time to time not be, in Goldberg's turn of phrase, "brutal," speaking quantitatively, it is nonetheless compelling in the constitutional
the interest that is subjected to possible deprivation should not de-
terminewhether a right to a hearing exists, it may have a legitimate
effect upon the form of notice and hearing required by due process.\textsuperscript{90} We submit that because unemployment benefits are closely anal-
gous, and often identical, to welfare benefits in their effect on an
individual's livelihood, an unemployment compensation pretermi-
nation hearing should have the same procedural elements specified
by the Court as minimal in \textit{Goldberg}.\textsuperscript{91}

Because the court in \textit{Torres} balanced the competing interests of
the individual and the state, an examination of those interests is in
order. In \textit{Torres}, as in \textit{Wheeler, Crow}, and \textit{Burney}, the defendant
states advanced interests identical to those expressed by California
in \textit{Java}. The primary justifications advanced by the states in support
of summary termination of unemployment benefits were desires to
minimize administrative expense and to prevent possible overpay-
ments in the event that a recipient is later found ineligible. Re-
butting similar governmental justifications, the Court in \textit{Goldberg}
held that such factors did not justify the denial of a pretermination
hearing: “The interest of the eligible recipient in uninterrupted
receipt of public assistance, coupled with the State’s interest that his
payments not be erroneously terminated, clearly outweighs the
State’s competing concern to prevent any increase in its fiscal and
administrative burdens.”\textsuperscript{92} It is apparent that the expenditures ne-
cessitated by pretermination hearings in unemployment compensa-
tion cases are minimal in comparison to those needed for public as-
sistance. In addition, public assistance benefits wrongfully paid to
recipients pending a due process hearing are generally unrecoverable,
since most welfare recipients are “judgment-proof.”\textsuperscript{93} Unemploy-
ment insurance recipients, on the other hand, are usually employ-
able and thus likely to return to the labor force and accumulate
sufficient funds to satisfy any debts owed to the state. If overpay-
ments are not repaid voluntarily, states can recover either by pro-
viding for an offset of future benefits to which a recipient might

\textsuperscript{92} 397 U.S. at 266. Similarly, the \textit{Fuentes} Court disposed of the state’s arguments
based on administrative efficiency in a footnote. 407 U.S. at 90-91 n.20.
\textsuperscript{93} 397 U.S. at 266.
be entitled,\textsuperscript{94} or by providing for the institution of civil\textsuperscript{95} or criminal\textsuperscript{96} suits.

There are additional means of reducing overpayments available to the states. As the Court noted in \textit{Goldberg}: "Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pretermination hearings and by skillful use of personnel and facilities."\textsuperscript{97} The court in \textit{Wheeler} suggested that by increasing the number of referees, states could minimize the time period in which appeals are pending.\textsuperscript{98} Since the state's administrative costs are reimbursed by the federal government and may not be drawn from the mutualized employer's fund,\textsuperscript{99} the hiring of additional referees would have no effect on the amount of money available for the payment of benefits. Finally, the court in \textit{Wheeler} suggested the state "turn its cadre of 'fact finders' into trained, impartial decision makers"\textsuperscript{100} on the theory that improvement of the initial determination process would reduce the number of appeals.

While there is a governmental interest in minimizing expense, it is also important to realize that there are governmental interests that are advanced by the payment of benefits pending a due process hearing. One of the primary purposes of unemployment insurance is to aid the "worker to find substantially equivalent employment."\textsuperscript{101} Summary termination of benefits causes many eligible recipients to go without funds that would assist them in finding new work, and may thereby increase the number of weeks for which they must eventually be paid benefits. Summary termination also compels some eligible recipients to attempt, as the court in \textit{Torres} admits, to resort to welfare in order to live while the appeal is pending, thus thwarting the unemployment insurance program's purpose of "maintain[ing] the recipient... without the necessity of his turning to welfare or private charity."\textsuperscript{102} The concept of summary termination runs contrary to the Social Security Act's purpose of providing money for the worker "at a time when otherwise he would have

\textsuperscript{94}See, e.g., \textsc{Calif. Unempl. Ins. Code} § 1379(b) (West 1972).
\textsuperscript{95}Id. § 1379(a).
\textsuperscript{96}Id. §§ 2101, 2110, 2113.
\textsuperscript{97}597 U.S. at 266.
\textsuperscript{98}335 F. Supp. at 862.
\textsuperscript{99}See note 31 supra.
\textsuperscript{100}335 F. Supp. at 862.
\textsuperscript{101}California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 132 (1971).
\textsuperscript{102}Id. at 131-32.
nothing to spend,” and thus defeats the governmental interest in maintaining the purchasing power of the unemployed, which in turn serves to aid industrial production. Without unemployment benefits, a recipient may be seriously hampered in appealing his termination. Funds are necessary to get in touch with witnesses, gather evidence, and possibly retain counsel. As the Court stated in Goldberg: “[A recipient’s] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from . . . bureaucracy.”

Another reason why a pretermination hearing is especially valuable in the continued claim situation was noted by the district court in Crow:

Though a determination that a recipient has “refused to accept suitable employment” would, in most instances, seem pre-eminently factual, it is made without the recipient being given advance notice that the issue has been raised, or the right to confront and cross-examine those persons whose testimony may prove decisive. It is this failure to provide what are alleged to be the requisites of a “due process fair hearing” that is said to run counter to Goldberg and Java. . . .

2. Payment “When Due”.— Probably the most important factor affecting the interests of all parties involved in the unemployment insurance system is the length of time required for an appeal to be heard and decided. As the delay increases, the hardship on both claimant and employer becomes more severe. Despite continuing efforts to expedite the appeal process, there is in most states, and particularly in those states with the greatest caseload, a substantial time lapse between the date of filing an appeal and the date of decision.

The detrimental effect of this delay without benefits on the unemployed worker is obvious. With respect to the employer-ap-

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103 Id.
104 397 U.S. at 264.
105 Crow v. California Dep’t of Human Resources Dev., 325 F. Supp. 1314, 1316 (9th Cir. 1971).
106 The delays for appeals decisions vary widely from state to state, and often from time to time within a given state. In New York, for example, from July 1971 to June 1972 more than 67 percent of the 44,323 lower authority appeals decisions took longer than 75 days, while in North Carolina for the same period only 1.6 percent of the lower authority appeals decisions extended beyond 75 days. In Ohio for the same period more than 75 percent of the 7,214 lower authority appeals decisions took longer than 75 days. Averaging all states, more than 50 percent of the 311,467 total lower authority appeals decisions took longer than 45 days, and roughly 30 percent took more than 75 days. U.S. DEP’T OF LABOR, MANPOWER ADMINISTRATION UNEMPLOYMENT INS. STATISTICS Table 17a (Aug.-Sept. 1972).
pellant, as the delay increases the prospects for unrecovered over-payments will also increase. The risk of loss on the individual employer is minimized in states using mutualized accounts and having provisions whereby the individual employer's account is not charged if he prevails at a later stage of the process. These practices shift the impact of delays from the individual employer and spread it collectively to all the employers in the state. On the other hand, this type of mechanism is not available to the worker, and a long waiting period for his appeal may mean abject poverty. In reviewing a state unemployment procedure that involved a 37.5 day waiting period, the Wheeler court said that this procedure was not "reasonably calculated to insure full payment [of unemployment compensation] 'when due.'" Inherent in the Wheeler rationale is a policy decision that the harm caused by delay has a more serious effect on the claimant than on the employer and that the state is in a better position to alleviate this harm than is the individual worker.

Thus, with respect to continuing benefits pending appeal, the continued claim situation logically involves the same weighing of interests as the Supreme Court applied in Java to the initial determination process. The states, however, have advanced a new position in an effort to distinguish Java. In the continued claim situation eligibility is dependent not only on an initial finding of qualification but also on independent weekly findings of continued eligibility. The states contend that in Java an initial determination of eligibility was made and that the state withheld the payment of the benefits as a procedural device, whereas in the continued claim case there was never a determination of eligibility and benefits did not become "due" within the meaning of either the Social Security Act or Java. This contention, based upon the proposition that each week involves a new determination, was discussed both in Torres and Crow. In Torres the court held that New York's procedure complied with section 303(a)(1) of the Social Security Act and stated that the Java decision was irrelevant because "benefits were suspended on the basis of new factual circumstances which could not have been considered at the original eligibility interview."

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108 335 F. Supp. at 861. The period is measured from the date the notice of appeal is filed to the date of the decision.
109 Id.
111 325 F. Supp. at 1319.
112 333 F. Supp. at 344.
A contrary conclusion was reached by the district court in Bur-ney:

Even though defendants review on a weekly basis the eligibility of
a claimant, the court finds that the concept of when benefits are
"due" under the Social Security Act does not change from week to
week after a claimant has been found eligible and no prior, [sic]
due process hearing has been held with regard to a subsequent find-
ing of ineligibility.113

On appeal, the Supreme Court did not reach the merits of the case
since it has vacated judgment and remanded the case to the district
court to consider whether the case was mooted by a subsequent ad-
ministrative reversal of the ineligibility determination as to class
representative Burney.114 Should the Supreme Court later rule on
Burney’s complaint or hear the arguments of other members of her
class, present or future, the Court may reverse, ignore,115 or distin-
guish its memorandum affirmance of the lower court in Torres. The
two dissenting Justices in Burney indicated that Goldberg consid-
erations may also invalidate the attempt by the lower Court in Torres
to distinguish Java.116 The Crow opinion suggests the same con-
clusion:

The key, then, to recent cases is not whether the entitlement is
vested but whether it is contested. When an individual is deprived
of statutory benefit which he has previously enjoyed due to an ad-
verse finding where factual issues are in dispute, and where the
agency concerned has acted upon third party information, the an-
cient and "relatively immutable" jurisprudence of Greene, Sinia-
dach, and Goldberg comes into play. It is in a case such as Mrs.
Crow’s, where the claimant said she was offered no job, and where
the interviewer disagreed, . . . saying he had learned she refused
employment, that confrontation and cross-examination are neces-
sary. This adverse finding, based on secondhand information
which was ultimately proven inaccurate, deprived Mrs. Crow not
only of payments for the particular week, but for nine weeks be-
yond that. Especially in light of this § 1260(b) “penalty,” impact
of the finding cannot be confined to that week in which it was
rendered; its real effect was to reverse, without a fair hearing, the
initial determination of eligibility. Goldberg and Java are clearly
in point, and will be applied by this court.117

C. Erroneous Denial of Eligibility: Shifting the Risk

This section focuses on the claimant who is less fortunate than
the plaintiffs in Java in that the merit of his claim for benefits is not

113 347 F. Supp. at 223.
115 See note 84 supra & accompanying text.
116 See note 71 supra.
117 325 F. Supp. at 1319-20 (footnotes omitted).
recognized until the hearing process. The claimant who is successful at the appeal process has been deprived of the use of his benefits during the time period required for the appellate decision. As discussed above, this deprivation is irreparable since the purposes of the unemployment insurance program have a narrow time reference. The goals of providing both sustenance and the means to obtain new employment clearly cannot be remedied post facto; further, the goal of maintaining consumer spending levels can be adversely affected by delay in the hearing process in time of economic distress. Statistics and common sense demonstrate a direct relationship between fluctuations in the level of unemployment and the length of delays in the hearing process. Economists reportedly agree that the time of greatest urgency for prompt payment of benefits is "early in the downturn, immediately after unemployment makes its appearance" and the Java Court acknowledged this as a legislative premise for requiring prompt payments under the Social Security Act.

An additional risk is that those whose claims are rejected at the initial determination will accept the decision of the claims examiner as authoritative and will fail to process an appeal because of timidity, lack of resources, frustration, ignorance, or other reasons. The unassertive or uninformed claimant may have been erroneously denied benefits. Errors not corrected through the appeals process obviously frustrate the goals of the program. The accuracy of the initial determination process could be significantly improved in sev-

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118 The magnitude of this problem is not determinable from current statistics. A superficial view of this issue would suggest that the number of successful appeals by claimants defines the limits of the problem. However, this approach assumes that every erroneous claims determination is appealed. This assumption, in turn, involves corollary assumptions that claimants have perfect knowledge of errors in the claims determination process and of the procedure for appeal. Access to legal services is another variable which affects the size of this problem.

119 In Ohio during 1970 the average monthly volume of benefit checks for total unemployment was 217,114. The comparable figure for 1971 is 308,068. Ohio Bureau of Employment Services Statistics, table RS 216.2 (Feb. 9, 1972) [hereinafter cited as OBES Statistics]. From 1970 to 1971 the number of claimants involved in appeals received, disposed of, and pending before the Board of Review almost doubled — from 6,673 to 12,847. Id. During this period of increasing unemployment and consequent claims for benefits, the number of cases decided by the referees only increased from 4,587 in 1970 to 6,663 in 1971. Id. table RS 221.4. The balance of the increased caseload merely added to the backlog of cases with the result that only 45.5 percent of all cases were decided within 75 days in 1971 as compared to 84.8 percent in 1970.


121 402 U.S. at 131-33.

122 See note 118 supra.
eral ways: (1) a greater allocation of resources at the initial level; \textsuperscript{123} (2) an allocation of personnel other than the decision-maker to advise unsuccessful claimants of their appeal rights and the formal recognition of this function as a significant factor in the budget; and (3) a formal provision for certification of questionable decisions to the hearing process at the initiative of the claims examiner or the supervisor as an integral part of the initial determination process. \textsuperscript{124}

The current system of payment imposes the full risk of delay on the claimant as well as the burden of establishing his entitlement to benefits. In contrast, the employer and the administrative structure are not penalized for delay in payment. In fact, under some circumstances the employer would derive tangible benefits from delay. For example in a state such as Ohio, which does not charge the employer's fund and experience rating until benefits are actually paid, delay may mean a lower experience rating (and tax) for an entire year.

In addition, the claimant's burden of establishing entitlement can be made more difficult by the employer's simple allegation that the separation was a "voluntary quit." \textsuperscript{125} The claimant has the responsibility to appear in person at the claims office and present written evidence, subject to penalties for fraud, while the employer's obligation is limited to completion of a short form which elicits little useful information. The employer is subject to only a modest penalty for failure to return the form. A telephone confrontation will generally entail little effort on the part of the employer, while the claimant faces a personal confrontation with a claims examiner.

The burden shifts to the employer only after an initial decision favors the claimant. The employer generally has no obligation to attend a hearing requested by the claimant \textsuperscript{126} and, in the authors' 

\textsuperscript{123} \textit{See} text accompanying notes 143-44 \textit{infra}.

\textsuperscript{124} In order to maximize the effectiveness of this certification process, an independent decisionmaker should be used to review the initial decision by the claims interviewer not to certify a case.

We expect that certification will encourage the claimant to maintain an effective appeal and, at the same time, would require some effort on the part of both the claimant and the employer to collect and present evidence for the hearing. The United States Department of Labor has recommended this approach on several occasions. \textit{USDL Letter}, \textit{supra} note 45 at 6.

\textsuperscript{125} By contesting a factual issue, the employer forces the claimant to prove the validity of his claim.

\textsuperscript{126} \textit{E.g.}, \textit{OHIO REV. CODE ANN.} \textsection 4141.28(J) (Page 1965). However, if the employer initiates the appeal and fails to appear at the hearing, state statutes often provide for default. \textit{E.g.}, \textit{id.} which provides, in part, that "the failure of the claimant or
experience, the claims examiner will further examine the claimant and adequately protect the interests of the employer.

As discussed above, the claimant presently has the burden of proving both monetary and nonmonetary eligibility. While the vast majority of claimants meet the conditions for monetary eligibility without dispute, the primary issues on appeal are nonmonetary issues regarding separation or continuing claims — the most difficult issues of proof.

The overview that emerges from the data is that claimants generally have met the preconditions for unemployment compensation by working for a sufficient amount of time in covered employment. A tax has been paid by the employer on the basis of their earnings and deposited in a fund. Yet, these claimants bear the risk that they will be unable to meet the procedural and substantive burdens of establishing that the unemployment is not their fault. Regardless of the reason for separation, the claimant is not currently employed and his lack of income can be expected to result in the adverse personal and societal consequences that the Social Security Act was designed to avoid.

One solution that would minimize the problems of lack of payment due to erroneous denials of benefits is to require payment to the claimant who protests the initial determination if he has satisfied the monetary requirements of the state law and presents a non-
frivolous appeal. Under this proposal, benefits would be paid until a hearing is held. As in our proposal for direct certification of questionable initial determinations to the hearing process, it is necessary that the decision as to whether a claimant's appeal is frivolous or nonfrivolous be made by an independent decisionmaker.

This radical restructuring of the unemployment insurance program would have the following beneficial effects: (1) the risk of delayed payment would be eliminated; (2) the employer would have an incentive to provide information promptly and to expedite the hearing process, reversing the current system of incentives to delay or to rely on administrative personnel to ferret out the facts; (3) the administrators would face a powerful and interested institutional adversary (the employers) to police any delays in the administrative process; (4) the purposes and goals of the program would be more fully realized both through prompt payment and the reduction of erroneous denials of benefits; (5) early entitlement would be based on relatively objective criteria for coverage — monetary facts — and the more subjective separation issues would be resolved in the more thorough adversarial hearing process, rather than in the informal and often expedited initial determination; (6) the claimant would have an incentive to exercise his appeal rights.

Arguments against this proposal will undoubtedly center on the risk of overpayments, as the arguments in Goldberg, Java, Crow, Torres, and Burney have emphasized. As discussed above, several methods of limiting overpayment could be easily implemented. However, even if we assume that no overpayments could be recovered, the cost, though high, would likely be bearable. For example, Ohio figures show that slightly more than 5 percent of new claims determinations, a total of 21,743 claimants, involve a protest by the claimant. The average weekly payment in Ohio for December 1971 was $52.29. Thus, assuming a doubling of the ap-

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131 A suggested set of standards for a nonfrivolous appeal is as follows: (1) the claimant has presented some evidence (more than a scintilla) on each element required to satisfy the legal rules; (2) issues of witness credibility should be resolved in favor of the claimant for purposes of deciding whether an appeal is nonfrivolous.

132 See note 124 supra & accompanying text.

133 Recoupment, penalties for fraud, and prompt screening to detect insubstantial appeals are suggestive of the methods which could be utilized to limit overpayments. Of course, the most effective device would be prompt appeal hearings with a strict limitation on the ability of a party to delay the hearing process. See text accompanying notes 94-97 supra.


135 U.S. Dep't of Labor, Manpower Administration Unemployment Ins. Statistics 3 (March 1972).
peal rate as a result of paying benefits pending a decision on appeal (43,486 claimants appealing) and a 4 week delay for hearing decisions, the cost would be approximately $9 million per year (43,486 \( \times \) 4 weeks \( \times \) $52.29/week). This is approximately 4½ percent of Ohio's current total annual payments of $197,234,000.\(^{136}\)

Another objection to the proposal might be that the initial decision-making process has already established a high degree of accuracy. This argument might focus on the facts that only 5 percent of the Ohio claimants appeal from adverse decisions and that, at most, 30 percent of those claimants eventually obtain reversals. Thus, the argument might continue, only 1½ percent of the initial determinations are revised in favor of the claimant, demonstrating a high level of accuracy.

This argument, however, assumes that all erroneous determinations are appealed, and it fails to recognize that in some situations variables other than the correctness of the decision influence the decision to appeal. Such factors include access to counsel, understanding of both the validity of the initial decision and the appeals process, availability of other resources to meet living expenses, and personal-psychological inhibitions to challenging a decision. Thus, no clear inferences about accuracy should be drawn from the decisions that are not appealed. Further, even if the process of initial decision is highly accurate, the proposed system of presumptive eligibility would have continuing validity, albeit to a smaller class of individuals.

A further objection to the early payment proposal is that the integrity of the Social Security Act may be violated by payment of benefits to individuals who have not officially been determined to meet the state statutory eligibility criteria. This argument assumes that all payments are made promptly "when due," which we have seen to be untrue as to reversals of denials of eligibility which often come 4 to 5 months or more after the filing of the appeal.\(^{137}\) Our argument instead proceeds on the factual promise of delayed pay-

\(^{136}\) Id. at 6.

\(^{137}\) Cf. California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 133 (1971), where the Court said:

We conclude that the word "due" in \( \S \) 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions. . . .

From this it can be argued that payments denied initially but later awarded following a reversal on appeal have not been made "when due" because they are "due" at the first hearing where payments can be permitted.
ment and seeks to discover a method for elimination of, or at least a shift in the risk of, delayed payment.

The goal is to make all payments immediately for eligible claimants. Payment on the basis of presumptive eligibility — based on qualification under the monetary standards and the filing of a non-frivolous appeal — may be the only means of reaching the goal of prompt payment of "due" benefits. This proposal furthers the purposes of the Act and meets the standards for risk distribution set forth above in the following ways: (1) It would impose the cost of the injury — loss of income due to administrative delay — on the enterprise from which the unemployment arose. (2) It would also impose the costs of payment on the parties whose costs for insurance are lower, that is, the employers and employees collectively through the existing unemployment system.

The alternatives are: (1) to continue the status quo in which the individual bears the burden of loss; or (2) to create a new mechanism to insure against the risk. The first alternative is inconsistent with our premise that risks should be distributed; the second alternative undoubtedly would be more costly (without regard to whether it is financed by employers, employees, or the government) than our proposal. In addition, our recommendations more closely coincide with the Calabresi standard that "whenever one party is in fact in a better position to allocate the costs of a particular loss to the appropriate activity or merchandise, allocation of resources requires that party to bear the original burden of the loss." Our proposal would simply shift this "original burden" from the claimant to an employers' mutualized fund and thereby allocate it to the collective business activities from which the unemployment arose.

In summary, we propose the prompt payment of benefits to claimants who meet the monetary requirements of the state law and who present a nonfrivolous case on the nonmonetary "separation" issues. The justice of this proposal is in its potential to redress the otherwise

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139 Calabresi, supra note 8, at 506-07 (emphasis added). The "original burden" to which we refer in this context is the financial impact of delayed payments. Because the present unemployment insurance system does not eliminate this risk or distribute it to the fund, the "original burden" has not been properly allocated.

140 A similar procedure is employed by some states in implementing various federal categorical assistance programs. In Ohio, for example, applicants for Aid for the Disabled and Aid to the Blind assistance receive up to 90 days of benefits ("pending adult assistance") while their medical forms are being processed and verified. OHIO DEPT OF PUBLIC WELFARE, OHIO PUBLIC ASSISTANCE MANUAL §§ 600-06 (1973).
insoluble problem of delayed payment of benefits caused by an erroneous denial at the first level of the administrative process. Because this proposal more clearly comports with the purposes of the Social Security Act and standards of risk distribution, the authors believe that it would be suitable as a judicial remedy to redress the existing imbalance in administration of the unemployment insurance program, especially in light of the extended inaction by the state legislatures (admittedly the most appropriate forum) and the ineffective action by the federal government.\footnote{Standards recently promulgated by the Manpower Administration of the U.S. Department of Labor, 20 C.F.R. §§ 650-1-.4, 37 Fed. Reg. 16173 (1972), issued under its authority to promulgate rules to insure conformity with the "when due" and "fair hearing" provisions of the Social Security Act, fail dramatically to redress the problems described in this article in two ways: (1) the standards do not minimize the risk of underpayment before the expiration of 30 days and (2) the standards are not fully effective until the calendar year 1975. These weaknesses in the standards must be viewed together with the traditional lack of enforcement of federal standards in the certification process for state administrative funds. See Larson & Murray, The Development of Unemployment Insurance in the United States, 8 Vand. L. Rev. 181, 208-10 (1955); DeVyver, Federal Standards in Unemployment Insurance, 8 Vand. L. Rev. 411 (1955). In this context, we cannot justify high expectations of federal leadership. Specifically, the federal standards, even when fully effective in 1975, would only require that 75 percent of the first level appeal decisions be issued within 30 days of the date of appeal and 85 percent of such decisions within 45 days. 20 C.F.R. § 650.4(b), 37 Fed. Reg. 16174 (1972). The standards do not address directly the issue of payment before the 30 or 45 day standards or the same issue in regard to the 15 percent of the cases which may extend beyond 45 days. Nor is a first-in, first-out method of scheduling required. Thus, a state could conform by avoiding troublesome cases for an indefinite period of time. In short, the federal standards provide little redress to the problems of the individual claimant.}

While the remedy of presumptive eligibility would, in our opinion, be the type of fundamental change that appears to be necessary, we will in the next section discuss more limited options which could more readily be implemented under the current interpretation of the limits of the unemployment compensation statutes.

V. CONCLUSIONS AND RECOMMENDATIONS

We have discussed the operation of state unemployment insurance systems and believe them to be deficient with respect to the terms of the Social Security Act, the Due Process Clause of the 14th amendment, and generally accepted principles of risk distribution. We have already proposed full implementation of the Java rationale to other stages of the administrative process at which the claimant is successful, and after examining the somewhat equivocal Supreme Court stance on the issue, have urged the continuation of payment pending a hearing in the continuing claims cases. In addi-
tion, we have proposed a system of presumptive eligibility for claim-
ants who meet both the monetary requirements of the state law and
present a nonfrivolous appeal as a radical method of redistribution
of the risk of underpayment of benefits.

Our experience also suggests some stopgap adjustments in the
administrative process that would ameliorate the problems discussed.
These proposals would involve a slightly different approach to the
problems through minimization of the risks of underpayment and
overpayment.142

We have seen that relatively sparse resources per case have been
committed to the process of the initial determination and the ad-
ministrative reconsideration, whereas relatively generous resources
are available at the board of review hearing level (and presumably
even greater resources at the point of judicial review).143 Reallo-
cation of priorities among the various decisionmaking functions
could lessen the likelihood of overpayment by improving the accu-
curacy of decisions at the earliest possible point in time. This can be
achieved in several ways: (1) Increase the time allocation for the
initial determination, directing that the difficult cases be given full
attention with a more thorough search for evidence, such as third
party statements, employment records and personnel policies;144 (2)
Eliminate the administrative reconsideration since it duplicates the
investigative and supervisory work that would now be conducted at
the initial determination; (3) Expedite the hearing process to min-
imize the risk that erroneous decisions will be in effect for a long
period of time; (4) Eliminate the upper authority appeals to mini-
mize costs which can be better allocated to other areas of decision-
making, leaving the function of third-level supervision to the courts.

Recommendations 1 and 3 would increase administrative costs,
whereas 2 and 4 would result in a substantial reduction of costs.
While our third recommendation would admittedly increase the
costs of the hearing process, our first recommendation would likely,

142 This approach parallels the suggestions of the Goldberg and Wheeler courts. See
notes 97-100 supra & accompanying text.
143 See note 48 supra & accompanying text.
144 Based on our own experience and discussions with Ohio Bureau of Employment
Services personnel in the Toledo, Ohio, office, it appears that claims examiners rarely
seek out or rely upon such documentary evidence as time cards, payroll records, writ-
ten warnings, or statements of company policy. Fellow employees or other third-party
witnesses are generally not consulted at the initial determination. Thus, although the
Bureau has broad statutory subpoena power to obtain documents and witnesses, this
power is generally not utilized at the initial determination level.
to an uncertain degree, reduce the number of appeals based on the assumption that there is a direct relationship between the accuracy of the decisions and the number of appeals. We cannot predict the exact effect of these changes on the overall cost pattern of the system; however, some observations on costs are in order.

The most compelling point is that the costs of accurate decision-making already exist. The delay in the hearing process, which would be remedied by our third recommendation, imposes costs that are currently being borne by the claimant who is successful on appeal and by the collective fund in cases in which the employer is successful. The claimant has been irremediably deprived of the use of his benefits because there is no institutionalized financing mechanism to enable a claimant to borrow on the expectancy of a successful decision from the hearing board.\footnote{145 Cf. Sniadich v. Family Fin. Corp., 395 U.S. 337 (1969).} Mutualization to the employer's fund is a cost to the system — albeit a more fairly distributed cost. The claimant's cost is significant not only because it is unfairly distributed, but also because it is incurred at all.

Improvement of the decisionmaking process in the suggested manner would thus expose a real cost of delay and, at the same time, minimize its amount by the simple expedient of hiring additional hearing examiners whose cost would be distributed among all participants in the system. Perhaps the unemployment compensation system could then accurately be termed a system of "social insurance."