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# Book Review [Data Processing Contracts and the Law]

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## BOOK REVIEWS

**DATA PROCESSING CONTRACTS AND THE LAW.** By Richard L. Bernacchi and Gerald H. Larson. Little, Brown & Company: 1974. Pp. xvii + 715. Cloth. \$25.00.

Few tasks are as intimidating to the average attorney as negotiating a contract for electronic data processing equipment or services. Contracts in the data processing field are complex, esoteric and veiled in technical jargon. Often unable to grasp data processing concepts, which can be studied for a lifetime and not fully comprehended, the attorney must rely on the judgment of the computer professionals on his client's staff. Bernacchi's and Larson's book attempts to bridge this gap between the data processing and legal professions, making each more sensitive to the concerns and requirements of the other. This is an optimistic objective, to say the least, and cannot be fully achieved in slightly over 700 pages.

*Data Processing Contracts and the Law*, however, is more successful in achieving this objective than previous attempts have been. For example, Roy N. Freed's *Materials and Cases on Computers and the Law*<sup>1</sup> consists of little more than reproductions of cases and standard contracts. Other literature either has been limited to a particular concern associated with the use of computers, such as individual privacy, or has been intended to serve as a primer for attorneys on basic computer concepts. An example of the latter is *Computers and the Law*,<sup>2</sup> which serves as an introduction to how computers work and how they can be used. No previous publication has attempted to explore the issues which arise in data processing contracts in the detail needed by the attorney in advising his client.

The authors note at the outset that the subject matter of the book is broad in scope, although limited to data processing related contracts. Other issues, such as government regulations, antitrust implications, the admissibility of computer-produced evidence, or the liability of the seller for usage of his products under conditions unrelated to the contracts, are not fully considered. For example, information privacy and security, although worthy of several

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1. R. FREED, *MATERIALS AND CASES ON COMPUTERS AND THE LAW* (1968).

2. STANDING COMMITTEE ON LAW AND TECHNOLOGY, A.B.A., *COMPUTERS AND THE LAW* (2d ed. 1969).

volumes alone, is discussed only as a contractual matter between service bureaus which process data belonging to another company. A fuller presentation would have considered the technological state of the art and the relative ability of the parties to assume the risk of protecting their data. State and local government contracting, which usually requires competitive bidding, is also not treated. Although such contracts are specialized to a degree, the private sector could gain much from the governmental experience.

The most serious omission in this book, however, is the lack of consideration given to tax implications or other cost factors involved in the data processing contract. While the reader is properly urged to consider all costs of an equipment or services procurement, he is not provided an analysis of the tax ramifications of the procurement decision, such as obtaining investment tax credit and capital depreciation, or protection against technical obsolescence via a short-term lease, with the procurement then treated as an operating expense. Nor are the tools for cost versus benefit analyses of such basic matters as lease, purchase, third party purchase, or other financing alternatives discussed.

Without a proposed method of evaluating the cost of a particular contractual term and the benefit of that term to the other party, the contract negotiation appears to be an exercise in raw bargaining power. The authors present it as such. While I have no quarrel with the frank admission that their text favors the buyer, the issue is not simply whether the buyer should insist on a contract containing his own terms. Those terms have a value to him and a cost to the seller. For the seller to vary his standard terms may mean increased costs, reflected in the price, or a simple refusal to do business. The buyer who insists on his terms alone may find that few sellers are willing to take inordinate risks and assume liability which may affect their ability to continue in business.

The authors, with a fair degree of accuracy, criticize the industry for failure to meet commitments, while they suggest that buyers demand terms which impose greater risks of failure on the seller. For example, in their discussion of warranties, the authors note that few manufacturers are willing to accept an express warranty of fitness for a particular purpose, and those that do demand a higher price. This is because the buyer is better able to determine his own requirements and the ability of the equipment or services to meet those requirements. Usually, the buyer bases his selection on the quality of the product and the reputation of the seller, not on contractual terms the seller offers. If the product is attractive enough, he may be willing to risk the possibility of unsatisfactory performance for the potential rewards the product

offers. The authors exhort data processing equipment purchasers to evaluate carefully their needs and the ability of the seller to meet them. Although as a general concept this is sound business practice, the authors seem to overlook the fact that the buyer is seeking a solution to a problem, not an ideal contract or a successful lawsuit.

Potential cost savings to the user and potential problems grow simultaneously, perhaps exponentially, when data processing systems increase in size, more sellers provide equipment and programs, equipment users develop their own programs and modifications to vendor-supplied programs, and communications devices interact with the system. The interaction of these various elements of the system cannot be known to the supplier and, therefore, he cannot be responsible for the failure of the system's performance. External factors, such as the qualifications of the user's personnel, the volume of data to be processed, and the operational methods used can also influence the success of the installation. By way of illustration of the impact of extreme factors, the authors mention the problem of power fluctuations, resulting in systems outages, which they ingenuously suggest could have been avoided by what they call "constructive contracting."<sup>3</sup> This reviewer submits that the contract has very little to do with the conditions under which the equipment will be operated. Other than contractually specifying the precise environmental factors required for his equipment, a supplier cannot be responsible for unanticipated acts beyond his control. If this subject is contractually considered by the parties, it invariably results in a contract disclaiming liability for environmental factors which the supplier cannot control, thereby placing this burden on the buyer.

The real value of this book is that it sets forth the factors which the buyer should consider when selecting data processing equipment and services. These factors should be acknowledged in negotiation whether or not they are incorporated into the contract. Regardless of whether the buyer or the seller assumes the risk, the potential difficulties should, where possible, be foreseen and acknowledged by the parties. The reader would probably benefit from examples of the detailed technical specifications for computer hardware and software which the authors suggest, and which probably differ little from those provided by reputable data processing equipment manufacturers for their standard products. It is usually the buyer's lack of appreciation of these specifications, or their implications, when applied to his requirements which causes most disputes.

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3. "Constructive contracting" apparently refers to the act of foreseeing *all* possible problems associated with the equipment procurement, then contractually assigning the responsibilities to the respective parties to the agreement.

Virtually all readers of this book will be aware of the rapid technological change which has characterized the electronic data processing industry. As competition increases, especially from foreign manufacturers, the pace of development is likely to accelerate. Mandatory adoption of equipment standards, such as common computer programming languages and symbols or physically compatible computers and peripheral equipment, dictated by legislation or powerful industry groups for the data processing industry, can only delay this progress. A particular user may desire such a standard because, with his limited perspective, he sees the opportunity to obtain a particular product which can be used with his existing equipment without the necessity of additional expense. In the long run, however, he may be benefited more by flexible standards or innovations which ignore standards but which more inexpensively meet his needs. Similarly, a demand by buyers that manufacturers agree to compatibility of future products or the maintenance of obsolete products would eventually slow the rate of new development to the user's detriment.

Another topic of particular interest to readers is the discussion of unique contracting areas. I know of no other volume which presents in detail the factors to be considered when contracting for service bureau work, time-sharing services, or customized software. Comparative contract clauses are included in some cases. Again, the clauses are useful to the extent that they point out the factors to be considered, so that the risks assumed by both parties are foreseen and fully understood.

The General Services Administration's data processing contracts are included in the appendix. Even considering the enormous bargaining power of the United States Government, the authors criticize these contracts for not being sufficiently buyer-oriented. The prototype contracts are nevertheless included for those who prefer a cookbook approach to data processing contracts, the GSA contract being presented as the "*Larousse Gastronomique* of the EDP world." While *Data Processing Contracts and the Law* is not the *Larousse Gastronomique* of non-cookbook EDP contracting, it provides a substantial hors d'oeuvre in this unique area. Despite its faults, it is satisfying to a degree, leaving this reviewer waiting for the main course. The optimistic objectives of the authors can only be fulfilled with a multi-volume treatise, an accomplishment which I eagerly await.

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**JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE.** By Samuel J. Brakel. American Bar Foundation: 1974. Pp. 129. Softbound.

*Judicare: Public Funds, Private Lawyers, and Poor People* appears at a time when the American Bar Association is exploring new ways of providing quality legal services at a minimum cost to low-income clients.<sup>1</sup> Unfortunately for the legal profession, and ultimately for the client community, the many good points which might have been generated from such a study are obscured by the numerous analytical distortions and non-evidentiary conclusions reached by the author. In judging the strength of Mr. Brakel's case for Judicare, this reviewer can conclude only that it presents an analytic nonsuit.

The Judicare model advanced by Mr. Brakel differs from the traditional staffed-office model in that in Judicare the dominant role is played by the private bar with professional poverty lawyers assuming only ancillary and specialized roles.<sup>2</sup> In his study, Brakel compares two Judicare programs in Wisconsin and Montana with a staffed-office legal services program in northern Michigan to reach his conclusion that the majority of legal services to the poor should be provided through a series of Judicare programs rather than through staffed-office programs.<sup>3</sup> This reviewer strongly disagrees both with the conclusions reached in Brakel's study and with his analytical technique, for the reasons discussed below.

#### *The Program's Effectiveness in Reaching the Poor*

The initial step in utilizing the Judicare system requires that the client be certified as eligible. In the Judicare programs analyzed by Brakel, the certification function was performed by welfare and community action program (CAP) agencies, which determined eligibility and distributed Judicare cards.<sup>4</sup> In staffed-office programs, eligibility is determined by the office staff and therefore becomes part of the internal cost of providing legal assistance. Since it is unclear from Brakel's study whether the expense involved in certifying clients was considered part of the cost

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1. See, e.g., F. MARKS, R. HALLAUER & R. CLIFTON, *THE SHREVEPORT PLAN: AN EXPERIMENT IN THE DELIVERY OF LEGAL SERVICES* (1974), which was also published by the American Bar Foundation.

2. S. BRAKEL, *JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE 3* (1974) [hereinafter cited as *JUDICARE*].

3. *Id.* at 12.

4. *Id.* at 28.

of the Judicare program, it is difficult to compare the costs of Judicare and staffed-office services. This difficulty raises the possibility that Brakel's conclusions respecting comparative costs of the two programs are simply inaccurate.<sup>5</sup>

Brakel also discusses the possible effect of utilizing welfare agencies to certify eligibility for Judicare. Instinctively one would expect that many potential clients would be discouraged from seeking legal assistance because of antipathy to the welfare concept, or because of the possible social stigma associated with welfare programs. Brakel concludes that "the possibility of stigma associated with welfare and CAP seems in fact to be virtually non-existent."<sup>6</sup> In reaching this conclusion he observes that, "[a]s for stigma, we specifically (and in a leading way) asked the respondents *with* Judicare cards whether they had any reservations about going to welfare or CAP agencies."<sup>7</sup>

It does not require an in-depth statistical analysis to recognize that respondents *with* Judicare cards are not the best people to ask whether welfare agencies discourage individuals from *getting* Judicare cards. Such respondents obviously have not been affected sufficiently by the welfare stigma to avoid using the program. Otherwise eligible non-clients were not asked whether they had been discouraged from seeking legal help because of the involvement of welfare agencies.<sup>8</sup> As a result, the reader is left to conjecture as to the actual effect the welfare stigma had upon persons eligible for Judicare, but who did not utilize it. Such statistical and analytical weaknesses are disconcerting and recurring elements in Brakel's analysis.

#### *Types of Lawyers Preferred by Eligible Clients*

Theoretically, under the Judicare system, the client would have virtually an unlimited choice of legal assistance, circumscribed only by the size of the local Bar. Although certification of eligibility may be obtained independently of any immediate need for legal assistance,<sup>9</sup> clients usually do not obtain the certification until an immediate legal need arises, prompting them to consult an attorney. After reviewing selection of attorneys by Judicare clients, the author concludes that:

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5. These observations would also apply to the conclusions reached by Mr. Brakel as to the need for outreach programs to advise potential clients of the services available.

6. JUDICARE, *supra* note 2, at 33.

7. *Id.* at 33 (emphasis added).

8. The deterrent effect of welfare agency involvement in certification would be most pronounced where a potential client seeks legal assistance in a claim *against* that agency.

9. JUDICARE, *supra* note 2, at 33.

[c]hoice is in fact meaningfully exercised by the Judicare clients and . . . this represents a crucial advantage [of the Judicare model] with ramifications beyond the narrow issue of whether choice as such is or is not "appreciated" by clients.<sup>10</sup>

It is undisputed that the greater the choice of available lawyers, the greater the likelihood that a client will be afforded meaningful representation. Brakel correctly points out that the choice of an attorney in a staffed-office program is limited by the number of lawyers employed by the program. He fails, however, to recognize that, within these confines, most staffed-office programs attempt to maximize client choice by allowing some flexibility in transferring cases away from attorneys whom the client dislikes. In any event, choice of a particular attorney is limited in the staffed-office program. This factor is most pronounced in domestic controversies where staff attorneys can represent only one side because of the conflict-of-interest problem.<sup>11</sup>

The question remains whether a meaningful choice of an attorney also exists in the Judicare model. Despite Brakel's conclusions that such a choice is possible, the study's statistics indicate otherwise. The author points out that where Judicare activity is high, statistics regarding attorney involvement are significantly weighted by "heavily involved" lawyers who handle the overwhelming majority of the cases.<sup>12</sup> Similarly, he notes, "[t]here are a few counties where Judicare activity is unusually low, where there is not even one 'heavily involved' lawyer."<sup>13</sup> Since there is no indication in the study that the residents of these counties had proportionally fewer legal problems, the choice and availability of a lawyer under Judicare is largely a function of the presence of a committed lawyer or group of lawyers rather than a result of any inherent advantage of the Judicare system.

Ironically, these "heavily involved" lawyers represent the very philosophy of attempting to change the conditions of the poor through law that the author castigates throughout the book. In the beginning of his book Brakel disparages the commonplace philosophy of "legal-services officials and proponents, politicians, and simple bystanders [who] speak about 'changing the condition of the poor through law,' or even 'eradicating the [very] causes of poverty.'"<sup>14</sup> Brakel continues:

Not only has the unreality of these goals made inevitable a degree and sense of failure, but it has also meant that

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10. *Id.* at 39.

11. *Id.* at 49.

12. *Id.* at 56, 60.

13. *Id.* at 61.

14. *Id.* at 1.

the quest to achieve these goals must involve unrealistic means. The theory has been that the job of "eradicating poverty" could not be left to the average existing lawyer; instead a corps of idealistic professional poverty-law experts was necessary, working out of neighborhood or regional offices and using novel legal strategy.<sup>15</sup>

Thus, except for the "heavily involved" lawyers who served the overwhelming majority of the Judicare population, Brakel's study indicates that the private bar was inefficient, insufficiently committed to the goal of providing legal services to the poor, and played only an incidental and negligible role.<sup>16</sup>

In discussing the characteristics of the "heavily involved" lawyers who made Judicare successful in some of the specific counties surveyed, the author writes:

There is an equation between involvement in terms of the number of cases a lawyer handles and his philosophical involvement with or commitment to the concept of systematic provision of sound legal service to the poor.<sup>17</sup>

He continues:

The pattern emerging . . . is a high correlation between a large Judicare caseload handled by a lawyer and the expression of broad views [by the lawyer] about the functions of Judicare, the role of the lawyer in the program, and the legal needs of the poor. By contrast, lawyers handling only a few Judicare cases on the whole had much narrower views on these issues. Wisconsin counties we studied saw the functions of Judicare and Judicare lawyers to include "social change" and "law reform," education of the poor and the community, improving the general plight of poor people, and attacking the root causes of poverty, in addition to providing routine legal services.<sup>18</sup>

Resolution of this continuing tension between handling routine service cases and reforming the law is beyond the scope of this review. For some years, however, it has been the subject of an often heated dialogue between opposing philosophical camps.<sup>19</sup> Nevertheless, the important conclusion to be drawn from Brakel's observations is that Judicare has succeeded only where the legal services were provided by private attorneys who

15. *Id.* at 1-2.

16. *Id.* at 61. See also Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 700-01 (1969).

17. JUDICARE, *supra* note 2, at 61.

18. *Id.* at 62-63.

19. Compare Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964), and Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242 (1970), with Brill, *The Uses and Abuses of Legal Assistance*, 31 THE PUBLIC INTEREST 38 (1973).

conformed to Brakel's rhetorical stereotype of a staffed-office attorney. In effect then, active Judicare counties financed legal service programs from private law offices, which conformed to the staffed-office model, but which operated under none of the policy controls inherent in a staffed-office.

In inactive Judicare counties the lack of such committed private attorneys led to a lack of choice or an uncertain availability of counsel. The best Judicare programs, therefore, seemed to be those which functioned essentially as staffed-office programs. Nevertheless, had staffed-office programs been used instead, they would have supplied the attorneys which were unavailable in the inactive Judicare counties. The question which remains is: why not simply rely on staffed-office programs?

#### *Types of Cases Handled by Each System*

In an attempt to demonstrate the significance of typical cases handled under Judicare, the author reviews the comparative case-loads of Judicare and staffed-office programs. He concludes that the quantity of controversial or complex cases, law reform through litigation or legislative action, economic development, and organizing of the poor—which he terms “impact work”<sup>20</sup>—is the same under either program.<sup>21</sup> To support this conclusion, he samples “impact” cases handled by Judicare attorneys. Those cases included some domestic matters, a food stamp hearing, and a “social security problem of unspecified importance.”<sup>22</sup> Perhaps this is an example of Brakel's bias, but it is difficult to understand how such cases can be characterized as “impact work” under Brakel's definition of the term. In staffed-office programs, such cases would be considered routine matters, having little significance beyond the parties directly involved.<sup>23</sup> Finally, the author seems to recognize the weakness in his own analysis when he points out that no study has ever validated, either qualitatively or quantitatively, the value of such “impact work.”<sup>24</sup>

#### *Quality of Service Rendered*

One of the most significant indices of the effectiveness of a legal service program, and one of the most difficult to measure, is the quality of service. Brakel states that “[t]he best, or rather the most relevant, determinant of quality, in our view, is the cli-

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20. JUDICARE, *supra* note 2, at 73.

21. *Id.* at 126.

22. *Id.* at 75.

23. *Id.* at 80-84. Brakel did not consider most of the staffed-office work to qualify as “impact work” unless it was specifically assigned to an attorney who specialized in test cases and law reform.

24. *Id.* at 88.

ent's evaluation of service received."<sup>25</sup> Applying this standard, Brakel concludes that client satisfaction with case handling is higher under the Judicare model than under the staffed-office model.<sup>26</sup> Two questions arise from this finding. The first concerns the validity of using such a test of quality, and the second concerns the possibility of bias inherent in the method used to obtain responses from clients.

The primary difficulty in using "client satisfaction" to evaluate the quality of legal services is the subjectivity and lack of precision inherent in such a test. Although Brakel analogizes the legal profession to the medical profession throughout his book,<sup>27</sup> he fails to utilize the objective criteria available for such a comparison. The comparable test of the quality of service rendered by the medical profession centers either on an assessment of the *process* of care (the manner in which a particular illness is treated) or on an evaluation of the *outcome* (the results of treatment by providers of medical care).<sup>28</sup> Although either approach could have been utilized in Brakel's study, neither was, rendering his analysis highly subjective.

A single example will suffice to indicate possible bias in Brakel's choice of questions. One of the primary questions asked staffed-office clients was:

Under Legal Services [in Upper Michigan] you go to a *government* lawyer. Under a different system, which is operating for instance in Wisconsin, you can get free legal service from a private lawyer of your choice. Which [system] do you think you would prefer?<sup>29</sup>

It is difficult to conceive of a more self-answering question. The use of the word "government" alone could be expected to reach the result obtained with a generally conservative rural population. The potential problem of biased questioning is recognized by Brakel and then rejected,<sup>30</sup> but his reasoning in rejecting it is unconvincing.<sup>31</sup> In the absence of valid evidence to the contrary, there

25. *Id.* at 89.

26. *Id.* at 96.

27. *See, e.g., id.* at 6.

28. R. BROOK, *QUALITY OF CARE ASSESSMENT: A COMPARISON OF FIVE METHODS OF PEER REVIEW*. H.E.W. Publication Number HRA 74-3100 (1974) [hereinafter cited as BROOK].

29. JUDICARE, *supra* note 2, at 102 (emphasis added).

30. *Id.* at 102 n.8.

31. In rejecting the possibility of bias, Brakel reasons:

It was difficult to phrase this question so as to preclude the possibility of bias. The wording is intended to be as factual and neutral as possible while still brief and comprehensive enough to elicit reliable answers. The characterization of staff lawyers as "government" lawyers reflects the clients' own way of dichotomizing the professional world: "government" is simply the opposite of "private"; anyone connected

is no reason to believe that the quality of service or client satisfaction is significantly different under either model.

### *Comparative Cost of Services*

Finally, Brakel concludes that the comparative cost of services is relatively equal under both models. This conclusion is largely the result of certain questionable assumptions and is reached in the face of factual evidence to the contrary. For example, he computes staffed-office attorneys' hours at seventy percent of a thirty-five hour week, but he provides no clear justification for the seventy percent figure and ignores the substantial overtime worked by most staffed-office attorneys.<sup>32</sup>

Judicare attorneys' hours, however, are computed by Brakel at one hundred percent of the reported level.<sup>33</sup> Even if one accepts the questionable validity of Brakel's assumed percentages, the actual comparative figures are dramatic. By Brakel's own figures, 8,575 attorneys' hours were provided at an annual cost of \$110,500 under the staffed-office model, while the Judicare model provided only 8,479 hours at \$153,271.<sup>34</sup> Thus, more attorney time was provided under the staffed-office model for less money, with an average hourly cost for the staffed-office model of \$12.88 compared with the Judicare model's average of \$18.08 per hour.

### *Conclusion*

The question of the best method of providing legal services to the poor is especially timely. Section 1007(g) of the National Legal Services Corporation Act provides for:

[a] comprehensive, independent study of the existing staff-attorney program under this chapter and, through the use of appropriate demonstration projects, of alternative and supple-

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with public service in an institutional setting, whether welfare or legal, or state, local, or federal is "government personnel" to clients. Also, clients by definition know about their own legal-services program and may have a general notion of the structure of the alternative, so that it is unlikely that whatever bias may flow from the use of a certain term would greatly influence responses. Moreover, any prejudgments associated with the term "government" probably cut in diverse directions: to some clients it may suggest the benevolent and the positive, to others the opposite.

*Id.*

32. *Id.* at 117. At the San Francisco Neighborhood Legal Assistance Foundation, for example, staff attorneys work a minimum 38¼ hour week and average approximately 10 hours per week in uncompensated overtime. These figures are generally comparable to those of other legal aid societies.

33. *Id.* at 118.

34. *Id.* at 115.

mental methods of delivery of legal services to eligible clients, including *judicare* . . . .<sup>35</sup>

Qualitative and quantitative studies, similar to the medical evaluation techniques discussed above,<sup>36</sup> would help develop and refine the most efficient ways of meeting the need for quality legal services. Unfortunately, *Judicare: Public Funds, Private Lawyers, and Poor People* does not advance this quest except perhaps by demonstrating mistakes to be avoided in the next study. One of the most basic of these errors is the reliance upon the oft-repeated but unproved hypothesis that conclusions from a rural study may be applicable to the urban setting.<sup>37</sup> One can only hope that future studies will be conducted, not by *Judicare* advocates or staffed-office advocates, but by truly independent and intellectually honest researchers, uncommitted to any predetermined outcome. The stakes for the low income client community are too high to do otherwise.

*David F. Chavkin\**

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35. 42 U.S.C. § 2996f(g) (1974) (emphasis added).

36. See BROOK, *supra* note 28.

37. In this context Mr. Brakel was unfortunately handicapped by the absence of any urban *Judicare* programs for comparative study.

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