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# BOOK REVIEW

**BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS, BY JERRY L. MASHAW. NEW HAVEN & LONDON: YALE UNIVERSITY PRESS 1983.**

*Reviewed by Richard I. Greenberg\**

## I. INTRODUCTION

The times do change. In the 1930's, an exciting group of academics addressed the problems of unemployment and human need and conceived an innovative national solution: The Social Security Act of 1935.<sup>1</sup> Almost fifty years later the program still stands. However, those giants of the 1930's are gone and we are left with a changed program administered by a massive bureaucracy concerned with consistency of administration and having no sense of mission or vision as to what needs to be achieved.

In the 1960's and early 1970's, Yale Law School seemed to be populated with exciting teachers and writers concerned with restoring mission and vision to the Social Security Administration. They addressed a problem created by the Social Security Act and the massive state and federal bureaucracy assembled to administer it. These programs had created a class of citizens dependent on bureaucrats they were powerless to influence. These Yale men conceived an innovative solution to the problem based on the Constitution of the United States. They transformed the unprotected "privilege" of receiving government largesse into a constitutionally protected "right"

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This review was written by Richard Greenberg in his private capacity. No official support or endorsement by the Office of Hearings and Appeals of the Social Security Administration, Department of Health and Human Services is intended or should be inferred.

1. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 301-1397 (1976 & Supp. V 1981)).

to receive statutory entitlements: *The New Property*.<sup>2</sup> This property could not be withdrawn by the government without providing the claimant an opportunity to hear the case against him and to present opposing evidence and argument.<sup>3</sup> These rights supplemented the statutory and regulatory procedural protections of the Administrative Procedure Act of 1946 (APA)<sup>4</sup> and the right to judicial review included by the early drafters and administrators of the Social Security Act.<sup>5</sup>

Now Jerry L. Mashaw, Cromwell Professor of Law at Yale University, tells us this was all wrong. The important things are not imaginative solutions to social problems or providing procedural protections from arbitrary government action. The important thing is consistency of administration or "bureaucratic rationality." He favors a retreat from procedural due process and opposes legislative reform because new programs produce, or at least do not reduce, the problems of consistent administration.<sup>6</sup>

Mashaw suggests that the ordinary concerns of administrative law are nearly irrelevant to the disability adjudication process. He describes such concerns as the result of a "sure instinct for the capillary."<sup>7</sup> In fact, he considers the APA and due process hearings a threat to the ideal bureaucratic system:

Our individualistic and democratic ideals, embodied in courts and legislatures, symbolically contradict the basic thrust of bureaucratic rationality. The external legal order provides not only inadequate remedies for bureaucracy's ills, but also symbols of justice or legitimacy that challenge the basic premises of the bureaucratic ideal.

Thus, looking at the administration of the disability program

2. Reich, *The New Property* 73 YALE L.J. 733 (1964).

3. *Id.* at 783-84 (footnote omitted).

4. Ch. 324, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982)).

5. As originally enacted, the statute required "fair hearings" in the state grant-in-aid programs. Social Security Act of 1935, § 2(a)(4), Pub. L. No. 74-271, 49 Stat. 620 (1935). The federal programs were amended in 1939 to provide for "[r]easonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, [the Board] shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse its findings of fact and such decision." Social Security Act Amendments of 1939, ch. 666, § 205(b), 53 Stat. 1360, 1368-69 (1939). The amendments also provided for subpoena, *id.* § 205(d), 53 Stat. 1370, judicial review based on "substantial evidence," *id.* § 205(2), and the right to be represented, *id.* § 206, 53 Stat. 1372.

6. J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 183-93 (1983).

7. *Id.* at 19.

through the judicial symbols of the rule of law—due process hearings and judicial review—we might denounce SSA's [the Social Security Administration's] attempts to manage the ALJ [administrative law judge] corps as the destruction of the claimant's guarantee of due process. If we took seriously the democratic symbolism of meaningful public participation in the development of administrative policy, we would decry the adoption of the grid regulations over the objections of virtually all the participants in the rulemaking process, and perhaps urge the invalidation of the regulations on that ground alone. We would therefore lament both the failure of SSA administrators to follow the lead of reviewing courts and the failure of reviewing courts to take a more aggressive stance in reshaping SSA administration in its own image, or some quasi-legislative image of participatory democracy.

I obviously believe that these external modes of "reform" are wrongheaded.<sup>8</sup>

Mashaw does not limit himself to the Social Security Administration's disability program. He believes this lawless example is a model of how bureaucracies should be run.

What appeals to him about the Social Security Administration? He is attracted by the unbridled discretion which horrified his fellow Yale men of the 1960's: the interpretation of statutes by bureaucrats without using APA procedures, the negligible influence on policy exerted by the administrative law judge corps, and the administrative defiance of judicial attempts to change statutory interpretation or influence administrative procedures.<sup>9</sup>

"[B]ureaucratic rationality—at least as practiced by SSA in the disability program—is a promising form of administrative justice. It permits the effective pursuit of collective ends without inordinately sacrificing individualistic or democratic ideals."<sup>10</sup>

This statement is preposterous. The disability program has threatened the good reputation of the Social Security Administration by causing it to abandon the accepted principles of due process in an attempt to make an unworkable program function. The text is a catalogue of the problems that a vague, poorly conceived statute can cause even the best intentioned and most competent of bureaucracies. Instead of regretting the compromise of accepted principles of administrative law and due process, Mashaw provides praise. He recognizes that the result has been inconsistent, expensive, pro-

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8. *Id.* at 222.

9. Compare Reich, *supra* note 2, with J. MASHAW, *supra* note 6, at 222.

10. J. MASHAW, *supra* note 6, at 222.

tracted and unsatisfactory claims adjudication, but insists that these are minor flaws which can be cured by further reducing the role of an independent appellate process.

The assumption is that a disciplined and expert bureaucracy can make any program work no matter how faulty its enabling legislation or underlying assumptions. Mashaw dismisses in a few short sentences the two most needed reforms: subjecting the bureaucracy to the norms of administrative law; and supplanting failed categorical programs with programs that are accurately targeted and administerable by fallible humans. Instead, he recommends testing of a few minor reforms such as claimant interview during the reconsideration process,<sup>11</sup> claimant representation at government expense,<sup>12</sup> and greater use of professionals in the claims adjudication process in the form of medical examinations and multiprofessional panels.<sup>13</sup>

It is discouraging that such a careful analysis, which recognizes and describes so many of the problems plaguing the Social Security Act's Disability program, can still prescribe "solutions" which refine and carry on the practices which have brought us to this near chaotic state.

This is a dangerous work, a paean to the unleashed bureaucracy. Thankfully the impenetrable prose of *Bureaucratic Justice* will prevent it from having wide influence.

## II. THE NEED FOR ADMINISTRATIVE LAW

While the applicability of the rulemaking provisions of the APA may be "only" the result of regulation<sup>14</sup> and the present provisions for judicial review "merely" statutory<sup>15</sup>, surely fourteen years after *Goldberg v. Kelly*<sup>16</sup> it is unquestioned that the adjudication of government benefits is subject to due process review.<sup>17</sup> Mashaw grudgingly concedes this is so while clinging to Justice Black's dissent in *Goldberg*.<sup>18</sup> Mashaw suggests that despite multiple reaffirmations of

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11. *Id.* at 199.

12. *Id.* at 200.

13. *Id.* at 202-209. The first of these experiments has already been incorporated into the statute. See 42 U.S.C.A. § 405(2) (West Supp. 1983).

14. 5 U.S.C. § 553(a)(2) (1982) exempts matters "relating to . . . benefits" from formal rulemaking requirements, but 36 Fed. Reg. 2532 (1971) directs that the Department of Health and Human Services use the APA procedures. National Welfare Rights Org. v. Mathews, 533 F.2d 637, 646 (D.C. Cir. 1976).

15. 42 U.S.C. 405(g) (1976 & Supp. V 1981).

16. 397 U.S. 254 (1970).

17. *Id.* at 262.

18. Black believed that because the fourteenth amendment "came into being pri-

the *Goldberg* opinion since 1970,<sup>19</sup> it should be reversed or at least reinterpreted to minimize the process that is due.<sup>20</sup> Recent trends in federal court actions in cases involving Social Security suggest that in the view of the federal judiciary it is still the claimant who needs protection from the agency and not vice versa.<sup>21</sup> Thus, it is unlikely that the type of reform Mashaw advocates will be forthcoming in the near future.

Nevertheless, there is merit in the position that the feeble attempts of the legal profession to bring *ad hoc* fairness to a program whose underlying theory is irrational has produced an anarchy in which claims are first adjudicated by a state agency on the basis of internal rules<sup>22</sup> not subjected to APA rule making,<sup>23</sup> then reviewed by administrative law judges on the basis of law and regulations interpreted independently by each judge, followed by sporadic, sometimes ill-informed, judicial review of only a handful of cases; occasionally without concern for the substantial evidence rule.<sup>24</sup> While this procedure is a form of anarchy, removing the legal profession from the process of adjudication, even if it were constitutionally possible, would not make things better.

Mr. Mashaw's concern regarding this anarchy in the program is plainly justified. And, as Mashaw argues, the solution to such anar-

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marily to protect the Negroes from discrimination . . ." it was inappropriate to provide its protections to the gratuity which welfare benefits represented. *Id.* at 275 (Black, J., dissenting).

19. Mashaw notes that LEXIS produced 1900 citations to *Goldberg* in 1981. J. MASHAW, *supra* note 6, at 4 n.10.

20. J. MASHAW, *supra* note 6, at 4.

21. *See Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982); *Day v. Schweiker*, 685 F.2d 19 (2d Cir. 1982); *Mental Health Ass'n. of Minn.*, 554 F. Supp. 157 (D. Minn. 1982).

22. 42 U.S.C. § 421(a)(1) (1976 & Supp. V 1981).

23. 5 U.S.C. § 553(b) (1982). Neither the directives to the state agencies, nor the state agency internal directives have been considered subject to the APA procedures. As this has been recognized as a source of confusion within the disability adjudication process, an attempt has been made to give this material some legal effect by republication in the Social Security Rulings. 20 C.F.R. § 422.408 (1983).

24. 42 U.S.C. § 405(g) (1976 & Supp. V 1981). The judicial review provision stipulates in part that:

The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section [entitlement to benefits] which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section [rulemaking authority], the court shall review only the question of conformity with such regulations and the validity of such regulations. . . .

*Id.*

chy is control of the bureaucracy by imposition of a hierarchical structure. Mashaw's vision of the role of administrative law within this structure, however, does not comport with traditional notions of fairness and due process. It is submitted that imposition of a hierarchical structure would be best achieved if adjudication were based upon published precedent. The decisions of the state agency should be subject to adversarial, on the record hearings where the initial decision would be defended by the deciding bureaucrat. The decision of the presiding administrative law judge would be subject in turn to the precedential rulings of the Appeals Council. The ultimate authority would be exercised through the publication of regulations by the Secretary of the Department of Health and Human Services appointed by an elected President with the advice and consent of an elected legislature. Such a program would not cry out for judicial redress of palpable injustice as does the present adjudication process. Judges would accordingly be less pressured to bend the substantial evidence rule or attracted to equitable intervention in the internal affairs of the program. Mashaw's suggestion that the way to solve the problem of uncertainty in the standards of adjudication is to give the civil service managers additional discretion to issue rules which will control the administrative law judges<sup>25</sup> would seem to appeal only to managerial aspirations.

Mashaw's characterization of the appellate process as a "capillary" is based on his perception that the mass of cases are adjudicated without the influence of the appellate system.<sup>26</sup> This is no longer factually true. The combination of increasing appeals and high reversal rates have raised the percentage of cases receiving benefits as the result of appeal to measureable levels.<sup>27</sup> More importantly, it would improve consistency of adjudication if the appellate system exercised influence on cases beyond those actually reviewed through published precedent.

Of course the present number of appeals and the bloated administrative law judge corps prevent effective function of a precedential appellate process, but there is no reason for the number of claims now reaching the appellate level except that it has served to

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25. J. MASHAW, *supra* note 6, at 15, 104, 145.

26. *Id.* at 19.

27. While initial claims dropped almost twenty-two percent between fiscal year 1981 and 1982, the number of requests for hearing rose almost fourteen percent. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMIN., PUB. NO. 70-032 (5-83), OPERATIONAL REPORT OF THE OFFICE OF HEARINGS AND APPEALS 18 (Sept. 30, 1982) [hereinafter cited as OPERATIONAL REPORT, Sept. 30, 1982].

justify the increasing agency resources devoted to the Office of Hearings and Appeals (OHA) to the great satisfaction of the bureaucratic barons who rule the OHA fief. One year after the disability program was originally enacted, thirty-five referees were able to handle the 6000 appeals generated throughout the country.<sup>28</sup> Now over 800 judges are unable to handle 320,000 requests for hearing.<sup>29</sup> There has been no comparable growth in the number of claims processed by the Social Security Administration as a whole.<sup>30</sup> The engine for this growth has not been the dictates of due process. The blame rests with the lawless system of bureaucratic rationality advocated by Mashaw. We have an appellate system without standards which encourages appeal by generously rewarding litigiousness.

### III. THE VALID CRITIQUE-REVERSAL RATES

The demand for a restriction in the importance of the hearings process is fueled by the unconscionable percentage of cases which are awarded by administrative law judges on review, now in excess of fifty-three percent.<sup>31</sup> Clearly these awards are not made on the basis of the same standards used in the initial reviews. Even worse is the variation in reversal rates among judges. Published statistics show these rates vary from ten percent to ninety percent with sixty-six percent of the judges reversing more than half the cases before them.<sup>32</sup> These statistics understate the actual reversal rate since they include as unfavorable determinations those cases dismissed on procedural grounds.<sup>33</sup> It is this fact which leads the bureaucratic powers within the administration (who are given courage by analyses such

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28. H. HYDEN, TWENTY SIX YEARS OF OHA, (The OHA Newsletter, SSA Pub. No. 70-040, Nov. 1983).

29. OPERATIONAL REPORT, Sept. 30, 1982, *supra* note 27, at 18 & 21.

30. The number of monthly benefit awards during the period 1957 to 1981 went from 178,802 to 345,254 with the peak reached in 1975 at 592,049. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMIN., PUB. NO. 13-11700, SOCIAL SECURITY BULLETIN ANNUAL STATISTICAL SUPP., Table 52, at 109 (1981) [hereinafter cited as the SOCIAL SECURITY BULLETIN of 1981]. This understates the program growth however since the SSI program was added in 1974. Nevertheless, it is evident that there has not been a 1400% increase in the program population as a whole.

31. OPERATIONAL REPORT, Sept. 30, 1982, *supra* note 27 at 19. A subcommittee on Oversight of Governmental Management puts the reversal rate at 67.2% in mid 1982. SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOV'T AFFAIRS, THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, S. REP. NO. 111, 98th Cong., 1st Sess. (1983).

32. ADMINISTRATIVE LAW JUDGES REVERSAL RATES—DISABILITY INSURANCE, 3 SOCIAL SECURITY FORUM 4-5 (1981).

33. Excluding the procedural dismissals raises the official reversal rate from 52.7% to 58.4% for fiscal year 1982. OPERATIONAL REPORT, Sept. 30, 1982 *supra* n.27, at 22.

as Mashaw's) to be concerned about whether independent administrative law judges are consistent with the purposes of the Act. The judges have shown little inclination to discipline themselves in this matter. Instead they tend to accept the characterization of the administration that their decisions are of little worth, representing at best a step in the adjudication of an individual claim, having no final authority and no context in the program at large.

The reason for the existence of this problem is not some subtle failing in the way in which the decisionmaking process is structured within the Social Security Administration or the inferior quality of the individuals who make up the administrative law judge corps. Accordingly, changes in how decisions are made or even who makes them will not necessarily alter the ultimate result. High reversal rates among administrative law judges have been tolerated until recent times not because Congress and the program administrators lacked the imagination to make the adjustments needed to change the situation, but because the high reversal rates were in fact desirable to sustain the political popularity of the Social Security programs. The process assured the the spurned claimants did not form the nucleus of popular dissatisfaction with the Social Security Act and its programs.

The program is financed by taxes which represent thirteen percent of most workers wages.<sup>34</sup> Taxes are unpopular. Taxpayers must be convinced that their taxes are not being squandered, hence the demand for strict standards of eligibility. However, claimants also vote and are intensely offended when their claims are denied. A strategy of strict enforcement of standards can threaten the viability of the program if taxpayers perceive that they are paying dearly for a program that does not pay off when they are in need. This problem has been avoided by never saying "no". The offended, denied claimant can always appeal and has only himself to blame if he does not pursue his claim the full route. Since the time, effort and lack of litigious predilection cause the less aggrieved claimant to accept a denial, the administration could afford to buy off a great deal of dissatisfaction by paying a large proportion of appealed cases without a proportionate increase in program costs. Program consistency suffered, but everyone went home happy.

This process worked well until recently when two factors led to a demand for "reform" which is manifested in the Congressionally

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34. For the current combined FICA rate for 1984, see Rates and Computation of Employee Tax, 1 UNEMPL. INS. REP. (CCH) ¶ 10,216 (Nov. 3, 1983).

mandated "Bellmon" review of judges with high reversal rates.<sup>35</sup> These factors were the exponential growth in the public knowledge of the easy fruits of appeal and the financial crises in the retirement program.

The increasing public knowledge of the high reversal rates at the administrative law judge level was also fueled by the fruits of such appeals for the legal profession. These fruits were sufficiently large to warrant front page coverage in *The Wall Street Journal*.<sup>36</sup>

A further contributing factor to caseload growth has been the administrative actions ostensibly designed to control the growing backlog of appeals. These administrative actions included dispensing with the review of favorable administrative law judge decisions,<sup>37</sup> increasing the number of judges,<sup>38</sup> providing additional staff and machinery necessary to processing ever larger numbers of cases with less and less consideration<sup>39</sup> and pressuring the administrative law judges to decide more cases without ever asking that the quality or correctness of the resulting product be considered.<sup>40</sup> The result

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35. Social Security Disability Amendments of 1980, § 304(g), Pub. L. No. 96-265, 94 Stat. 441 (codified at 42 U.S.C. § 421 note (Supp. V 1981)). See also S. REP. NO. 408, 96th Cong., 2d Sess. 52-56, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1277, 1330-34. Congress may now be swinging in the other direction. A recent Senate subcommittee report suggests that the emphasis on review of reversals by the administration was misplaced. See *supra* note 31, at 9. The Association of Administrative Law Judges has filed suit alleging that the administration's interpretation of the Bellmon Review has interfered with adjudicative independence. *Association of Admin. Law Judges v. Heckler*, No. 83-124 (D.D.C. Jan. 19, 1983).

36. *Growth Industry—Disability Cases Under Social Security Are a Boon to Lawyers*, Wall St. J., Jan. 14, 1982, at 1, col. 1.

37. In fiscal year 1982 after the *Bellmon* review was initiated, the Appeals Council reviewed 12,000 "favorable" administrative law judge decisions as compared with 65,000 "unfavorable" actions. *Social Security Disability Reviews: The Role of the Administrative Law Judge, Hearings Before the Subcomm. on Oversight of Government Management*, 98th Cong., 1st Sess. 30 (1983) (testimony of Comm'r Louis B. Hays). The Office of Hearings and Appeals, however, reports only 63,559 dispositions by the council in the same period. OPERATIONAL REPORT, Sept. 30, 1982, *supra* note 27, at 26.

38. OPERATIONAL REPORT, Sept. 30, 1982, *supra* note 27, at 21.

39. *Id.*

40. The Administration brought an adverse action before the Merit Systems Protection Board against an Administrative Judge whose only failing was not producing in excess of twenty cases per month. The average administrative law judge produced about nine decisions per month in 1965. DEPARTMENT OF HEALTH AND HUMAN SERVICES SOCIAL SECURITY ADMIN., Pub. No. 70-032 (6-80), OPERATIONAL ANALYSIS OF THE OFFICE OF HEARINGS AND APPEALS, 33, 44 (Sept. 30, 1979) [hereinafter cited as OPERATIONAL ANALYSIS, Sept. 30, 1979]. Despite the recommendation of presiding administrative law judge, the Board declined to take adverse action, suggesting that the Administration had failed demonstrate that the lack of numbers was equivalent to a lack of diligent performance. *SSA v. Goodman*, No. HQ75218210015 (MSPB Feb. 6, 1984).

has been mathematically predictable. More favorable decisions meant greater public awareness, greater attorney awareness and more appeals. It never bothered the administrators that their efforts at backlog control were a consistent failure since the growth simply increased the command of the fiefdom on ever greater resources. The disability trust fund remained financially healthy. In fact, despite the profligacy of the administrative law judges, the number of claimants on the disability roles has fallen steadily since 1977, and the number of claims granted per month has fallen since 1975.<sup>41</sup> These facts cannot be explained by the effect of the recent improving economic climate or the review of eligibility pursuant to Congressional mandate. No one seriously argues the other possibility, that the disastrous increases in private health insurance programs, Medicaid and Medicare, have in fact had a positive impact on the health of American workers.

The process affecting the Social Security Administration's program was paralleled and possibly abetted by developments in the private sector. Despite Mashaw's belief that the private sector had been driven from the disability arena,<sup>42</sup> private policies providing cash benefits in the event of disability proliferated along with Workmen's Compensation programs. The administration of these programs is almost unbelievably lax, providing astronomic payouts under the most questionable circumstances. Among the private insurers there is even less pressure to deny claims since profits are made not by a discrepancy between intake and payout but by investing the proceeds pending payment: the higher the experience, the higher the cashflow, the greater profits. These programs also depend on the credibility of the expectation of payment. The mushrooming expectations of what constitutes a compensable loss of capacity has pervaded the factories and workplaces and has created changed expectations of what is compensable under the Social Security Act.

This climate changed suddenly with the crises of the retirement trust fund. The need for transfusions from the disability trust fund (brought on by demographics, not lax administration or unruly administrative law judges) led to a bleeding of the disability trust fund to support the retirement program. Left to its own devices, the rational bureaucracy would have responded to the need for reduced payments without difficulty. But hell hath no fury like the disability claimant scorned. These claimants have an understandably high

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41. SOCIAL SECURITY BULLETIN of 1981, *supra* note 30, Tables 52 & 60.

42. J. MASHAW, *supra* note 6, at 34.

propensity to appeal.<sup>43</sup> In the judicial context these appeals have great merit as the result of conscious or subconscious considerations of *res judicata*. The courts, Congress and state governments have reacted to affirm this precept despite bureaucratic disfavor thus frustrating the attempt to control program expenditures. The acceptability of inconsistent adjudication has died not because it had interfered with bureaucratic rationality, but because financial circumstances have changed. The cause of these problems was not administrative law, but the failure of bureaucratic rationality. High reversal rates will not be cured by attempts to curb the judiciary, but by applying administrative law. APA rulemaking procedures and precedential decisionmaking are the keys to less arbitrary adjudications and thus reducing the high propensity to appeal.

#### IV. THE NEED FOR LEGISLATIVE REFORM

Ultimately this debate about how the program should be administered is petty. It is naive to assume that either bringing the discipline of classic administrative law to the Social Security Administration or allowing the bureaucracy full discretion to create arbitrary but administrable standards will solve the problems created by the disability programs. It is not just inconsistent adjudication that troubles the disability program, but also the inconsistency of the disability program itself with generally understood ideas of fairness. Even the most consistent program of adjudication will not remove the public concern if evenhandedness still produces socially undesirable results.

An understanding of the source of the disability program and how it developed is an aid to understanding its current problems. Mashaw does not discuss in detail the philosophical underpinnings of the program or its history. He observes briefly:

[A] disability program was proposed in the original planning that led to the Social Security Act of 1935, but no such program was even haltingly begun until 1950, and it did not become a full-fledged early-retirement benefit scheme until 1960. Congressional consideration consistently reveals a single dominant reason for reluctance to rationalize the Social Security scheme by adding disability benefits: moral hazard. The disability program could easily turn into a residual unemployment program. Intense applicant pressure to expand the beneficiary class is to be expected in cycli-

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43. OPERATIONAL REPORT, Sept. 30, 1982, *supra* note 27, at 18.

cal economic downturns. The program thus requires very tight administration to maintain its integrity.

The experience of private disability insurance in the 1920's suggested that adversarial adjudication was not such a system. Several insurers were bankrupted by judicial expansion of their policies' conception of the covered risk; and all private carriers abandoned the field when judicial construction, in the face of rising unemployment, made disability actuarially unpredictable. . . .<sup>44</sup>

A slightly more detailed view of the program explains much about its problems. First it is noted that the Social Security Act of 1935 was the result of intense concern with the results of the economic depression that had begun in 1929.<sup>45</sup> Workers had lost their jobs in great numbers as the result of economic conditions not weakness of character or body. Many had lost their life's savings as the result of bank collapse or stock market losses or the decline in value of investments. The incoming Roosevelt Administration addressed itself first to providing jobs to the able-bodied through programs such as the WPA and to providing federal monies to the state relief programs to assist all who were in need. Having addressed those problems, the next order of business was to create programs for the longer term. These programs included not only the program of contributory retirement insurance which we now equate with Social Security, but also the state-administered unemployment programs and grants in aid of state programs to benefit the destitute elderly, dependent children and the blind. The latter programs had historic precedent and were considered non-controversial. Granting federal money to assist state run aid to the aged programs was thus placed as Title I to the bill to camouflage the more novel and controversial national insurance program.<sup>46</sup>

Prominently missing from the original Act were programs dealing with health and disability. Workmens compensation plans had

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44. J. MASHAW, *supra* note 6, at 34.

45. F. PERKINS, *THE ROOTS OF SOCIAL SECURITY 2* (The Beginnings of Social Security, OA-DTC Pub. No. 88-72 (11-72)).

An interesting early history of the Social Security Act is provided by a series of pamphlets issued by the Social Security Administration bearing the title: *The Beginnings of Social Security*. They represent speeches and interviews with the participants in the task force which drafted and guided the passage of the Act.

46. E. CLAGUE, *FACTORS CONTRIBUTING TO THE PASSAGE OF THE SOCIAL SECURITY ACT 14* (The Beginnings of Social Security OA-DTC PUB. No. 086-72 (11-72)).

antedated the Act,<sup>47</sup> providing limited liability to employers for injuries to workers in the course of employment.<sup>48</sup> Health insurance was actively considered by the drafters of the original act but was not pursued because the vehement opposition of the American Medical Association made the matter so controversial as to jeopardize the other programs.<sup>49</sup> Benefits for workers who became invalids prior to retirement age were discussed but deferred along with benefits to survivors and dependents.<sup>50</sup> It is not clear that anyone at that time discussed a disability program as we know it today, *i.e.* one providing benefits to individuals of all ages regardless of past relation to the labor market, based on a medically-established inability to perform any type of work.

The federal government entered the fray of disability benefits in 1950 by adding a new category to the state granted-in-aid program.<sup>51</sup> The original categorical programs had been Aid to the Aged, Aid to the Blind, and Aid to Dependent Children. The new program simply provided benefits to "individuals eighteen years of age or older who are permanently and totally disabled. . . ."<sup>52</sup> It was up to the states, with federal guidance, to fill in the details of who was covered and how eligibility was established. It was thought that about 200,000 workers would be affected and not all states chose to be included.<sup>53</sup> The bill had provisions for benefits under the insurance titles of the act as well, but these were not adopted.

In 1954, the first step in the federally administered disability program were taken very much in the manner of private insurers, not through the provision of cash benefits, but through waiver of premium for retirement benefits.<sup>54</sup> A worker would normally receive benefits from the program at age sixty-five only if he had paid into the program for the requisite period of time. All that was initially provided was that a worker, unable to maintain insured status by reason of a medically determinable impairment of long and in-

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47. The first workmen's compensation statute was created by New York in 1910. B. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR* 695 (1961).

48. J. BROWN, *THE AMERICAN PHILOSOPHY OF SOCIAL INSURANCE I* (The Beginnings of Social Security) SS Pub. No. 85-72 (11-72)).

49. T. ELIOT, *THE LEGAL BACKGROUND OF THE SOCIAL SECURITY ACT 7* (The Beginnings of Social Security OA-TCD Pub. No. 084-74).

50. E. CLAGUE, *supra* note 46, at 16.

51. Social Security Act Amendments of 1950, Pub. L. No. 734, 64 Stat. 477 (1950) (codified as amended 42 U.S.C. §§ 301-1397 (1976 & Supp. V 1981)).

52. 42 U.S.C. § 1351 (1976 & Supp. V 1981).

53. H.R. REP. NO. 1300, 81st Cong., 1st Sess. 53 (1949).

54. Social Security Act Amendments of 1954, Pub. L. No. 761, 68 Stat. 1052 (1954) (codified as amendment 42 U.S.C. §§ 301-1397 (1976 & Supp. V 1981)).

definite duration which prevented all substantial gainful activity, would not lose eligibility for retirement benefits. His insured status would be frozen thus preserving his eligibility for, and the amount of, the benefit already earned when he reached the normal retirement age of sixty-five.<sup>55</sup> As the benefit provided was reasonably related to the test applied, little difficulty was experienced. The impact of an impairment on work capacity could be judged against the long work history required to establish the insured status being frozen.

Problems have arisen because the benefits provided have become divorced from the original requirement that there be a long connection with the labor force prior to payment of benefits. The "freeze" was augmented in 1956 with provision for payment of cash benefits to disabled workers who had reached age fifty and to the adult children of eligible workers who became "disabled" before age eighteen.<sup>56</sup> In 1960, payment of benefits to workers of all ages was added along with reductions in the requirement that there have been recent long connection with the labor force.<sup>57</sup> Further dilution in the program occurred in 1965. The earlier requirement that the impairment be of "long and indefinite duration" was liberalized to provide for payment of benefits when the impairment was expected to last only twelve months or result in death.<sup>58</sup> Payments were also permitted to blind workers who because of their youth had only minimal connection with the labor force.<sup>59</sup> The limitation of this provision to the blind was deleted in 1968.<sup>60</sup>

This extension of benefits to claimants with only marginal connection to the labor force was only one of the ways in which the 90th Congress demonstrated its ambivalence toward the purposes of the disability program. On the one hand it affirmed that disability was not an addition to the unemployment programs by rejecting the "hire-ability" standard which had become increasingly popular with

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55. *Id.* § 106, 68 Stat. 1079.

56. Social Security Act Amendments of 1956, Pub. L. No. 880, §§ 101 & 103, 1956 U.S. CODE CONG. & AD. NEWS (70 Stat.) 942-45, 952-63.

57. Social Security Act Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924 (1960) (codified as amended 42 U.S.C. §§ 301-1397 (1976 & Supp. V 1981)). See section 401(a) of the amendments, *id.* 74 Stat. 967 ("[E]limination of requirement of attainment of age fifty for disability insurance benefits in certain cases."), and section 404(a), *id.* 74 Stat. 970 ("Special insured status test in certain cases for disability purposes.").

58. Social Security Act Amendments of 1965, Pub. L. No. 89-97, § 303(a), 79 Stat. 286, 366-67, (1965) (codified as amended 42 U.S.C. § 416(i)(1) (1976 & Supp. V 1981)).

59. *Id.*, § 344(a), (b), 79 Stat. 412-13 (codified at 42 U.S.C. § 416(i)(3)(B) (1976)).

60. Social Security Act Amendments of 1968, Pub. L. No. 90-248, 81 Stat. 821 (1968) (codified as amended 42 U.S.C. §§ 301-1397 (1976 & Supp. V 1981)). Section 105(a) provides coverage for "younger disabled workers." *Id.*, 81 Stat. 833.

the courts,<sup>61</sup> leading, for example, to a district court reversal rate of almost thirty-five percent in fiscal year 1965.<sup>62</sup> The new standard required that the claimant be:

not only unable to do his previous work but [also] considering his age, education, and work experience, [be unable to] engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.<sup>63</sup>

On the other hand payments were added for those who had no prior connection with the labor force: widows aged fifty to fifty-nine. The problems with adjudicating these claims was to some extent ameliorated by requiring that they meet an "objective" standard of disability in the form of a listed impairment. Congress also sought to affirm its faith in the medical profession by making explicit the requirement that disability be established by "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques."<sup>64</sup> These amendments aided the reduction in district court reversals to less than twelve percent by fiscal year 1977.<sup>65</sup>

The definition of eligibility was completely divorced from reality by its 1974 application in the Supplemental Security Income (SSI) program to those who by definition had little or no connection with the labor market.<sup>66</sup> The ultimate absurdity has been the attempt to apply this standard to the SSI childhood disability program in which a child can be adjudicated "disabled" on its day of birth.<sup>67</sup> The nightmare of picking out which basinette contains the infants capable of substantial gainful activity despite their self evident clinical status must haunt everyone in the program. Not surprisingly, district court reversal rates climbed to almost twenty-five percent by fiscal year 1981.<sup>68</sup>

The addition of the SSI disability programs to the Social Secur-

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61. S. REP. NO. 744, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. AD. NEWS 2834, 2880-2883.

62. OPERATIONAL ANALYSIS, Sept. 30, 1979, *supra* note 40, at 36.

63. 42 U.S.C. § 423(d)(2)(A) (1976).

64. *Id.* § 423(d)(3).

65. OPERATIONAL ANALYSIS, Sept. 30, 1979, *supra* note 40, at 36.

66. H.R. REP. NO. 231, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4989.

67. 42 U.S.C.A. § 1382c(a)(3)(A) (1983).

68. OPERATIONAL REPORT, Sept. 30, 1982, *supra* note 27, at 27. While the reversals decreased three percent in fiscal year 1982, the remands increased 13.6%. *Id.*

ity Administration's caseload was not the result of careful social engineering, but a political accident. This program is the carcass of a failed attempt to create a guaranteed annual income during the Nixon Administration. As originally conceived, the program dealt chiefly with the aid to families with dependent children program and the debate centered on this aspect of the bill even though it was eventually dropped from the conference committee report.<sup>69</sup>

The problems produced by state administration of the grant-in-aid programs had created a demand for federal administration. The problems included mushrooming costs to state government when federal regulations invalidated state attempts to hold down eligibility and a perceived unfairness and unevenness in state administration. Transfer to federal administration was politically appealing because it immediately relieved the state treasuries and because federal administration, as exemplified by the Social Security Administration, was thought to be less judgmental and thus less demeaning to the claimant population.<sup>70</sup> The impact has been the opposite of what was desired. The image of the Social Security Administration has been tarnished without any noticeable improvement in the quality of the relationship between the dependent claimants and the government. The conclusion to be reached from this is that the reputation of the Administration had been built on the sound basis of an easily administerable retirement program, not on a unique form of internal organization.

In creating the SSI program, Congress simply made the existing definition of disability applicable to the new group of claimants.<sup>71</sup> There is no indication that any thought was given to whether it was appropriate to apply a standard which had developed meaning based on its application to claimants with a work background to claimants who almost by definition had never worked. Nor did the Social Security Administration have prior experience with the application of a "means" test designed to separate the "needy" from those with the "means" to maintain an adequate standard of living. Having determined that a claimant is in need, human administrators may have some difficulty in denying benefits to a claimant because he has the theoretical capacity for a hypothetical job. Faced with a vague statute combining conflicting social goals, the Social Security

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69. See generally D. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* (1973).

70. H.R. REP. NO. 231, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4989-94, 5144-82.

71. *Id.* at 5013.

Administration has produced uneven adjudication. At least with the disability program as originally drafted, the Administration had a benchmark of past employment to judge the impact of illness on work capacity. With the newer programs, it became ever more difficult to separate the economic and sociological causes of unemployment from the medical causes. Decisionmakers were faced with claimants who had worked despite profound medical problems and those who had never worked because of medical problems so subtle as to defy detection.

The problem here is two-fold: 1) Our economy does not provide work to all or even require all to work; and 2) short of coma and death, there are no clinical or laboratory findings that are invariably associated the incapacity to perform gainful activity.

As to the first point, Mashaw repeatedly concedes that it is difficult to distinguish between the unemployed and the disabled. He observes that the Act is ambivalent on the point, providing that the program is only concerned with the "inability" to perform, not the practical availability of work, while also considering age, education and past work experience, factors manifestly related only to "employability" rather than capacity.<sup>72</sup> But Mashaw does not berate Congress for its ambiguity: "[T]here is in these remarks no necessary criticism of the legislative mandate. Social policy as legislatively crafted into programmatic directives should not be expected to emerge as a set of fully coherent approaches to unitary goals."<sup>73</sup>

As to the second matter, the lack of scientific measures of the capacity for gainful activity, Mashaw recognizes the difficulty in associating any particular facts with a claimant's capacity to contribute to society.<sup>74</sup> He fails to understand that the difficulty is practical impossibility. "The realization that the ideal of instrumentally rational administration cannot be achieved does not justify a resigned cynicism, however, only a more balanced idealism. Our normative questions need only take account of a complex and compromised reality."<sup>75</sup>

Mashaw goes on to propose that because it is possible to reach agreement on cases at the extremes—the healthy and the dead—that it is also possible to make correct determinations in between, if we are willing to pay enough in money and social disruption to obtain

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72. J. MASHAW, *supra* note 6, at 53-56.

73. *Id.* at 55.

74. *Id.* at 63-64.

75. *Id.* at 78.

the necessary information.<sup>76</sup> The problem is merely deciding when the degree of error becomes too expensive to eliminate.<sup>77</sup> It is this assumption that misleads Mashaw. A problem such as identifying whether a claimant is eligible for retirement benefits is amenable to this analysis. The issues are factual: whether the claimant is sixty-five years old and whether he has the requisite insured status. If one restricts the investigation of eligibility to asking the claimant for information to determine whether he qualifies, there will be a certain margin of error. This margin may be reduced by spending more and more effort on investigation. For example, the Social Security Administration may require that the claimant produce a birth certificate; it may inquire of the bureau of vital statistics as to the validity of the certificate; or it may investigate whether the records of the bureau are accurate and so forth to a point of diminishing return.

No amount of investigation will reduce the margin of error in making disability determinations. Despite the Congressional admonition that the determinations rest on "objective" evidence, disability determinations are inherently subjective. There can be no agreement on what it means to be "unable" to perform substantial gainful activity as there are no medical measures of work capacity.<sup>78</sup>

The error in Mashaw's analysis is graphically presented at page eighty-three of the text. The graph attempts to demonstrate that there is a point at which the marginal utility of more refined analysis of a claimant's disability reaches zero. The graph shows a straight line relationship between a variety of factors.<sup>79</sup> Professor Mashaw (and everyone else with a sense of humor) should consider Martin Gardner's analysis of the Laffer curve in light of "technosnarl".<sup>80</sup> We do not know that a straight line connects the extremes and we do not know whether there is a measureable distance between those obviously disabled and those who are obviously able. The distance is likely to be very small and the mathematical function that describes the curve is beyond comprehension. This accounts for the conclusions of several studies, including those cited by Mashaw, that trained disability examiners asked to adjudicate a sample of cases

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76. *Id.* at 79.

77. *Id.* at 80.

78. See generally R. DIXON, *SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION* (1973). This book updates and expands on an earlier article: DIXON, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681.

79. J. MASHAW, *supra* note 6, at 83.

80. Gardner, *Mathematical Games: The Laffer Curve and other laughs in current economics*, 1981 SCI. AM., Dec. 18.

may in fact find approximately the same percentage of claimants disabled but will not agree as to which claimants are disabled or the severity of their disabilities.<sup>81</sup>

A case in point is a poster that was ubiquitous in the author's journeys through New York City as a law student. The advertisement featured a picture of a quadriplegic, confined to his wheelchair. His only method of control was a stick held in his teeth: the quintessential disabled. The caption: "COMPUTER PROGRAMMER—I got my job through the New York Times." The examples are everywhere. Our former offices required that claimants be escorted to their hearings by an elevator operator who was a diabetic paraplegic. When these individuals, who have established their capacity for gainful activity despite profound impairments in capacity, are compared with those who are entitled to benefits because of deafness, dependent personality disorder, anxiety, or alcoholism, the inherent difficulty in determining what truly constitutes a disability is made plain.<sup>82</sup>

It is submitted that no system, whether designed by bureaucrats, experts, lawyers or priests, can give a satisfactory definition to the disability program embodied in the present Social Security Act. Because the program was accreted and not designed, the risk being assumed for the individual by the government is unclear. If it is the simple risk of indigency, what purpose is served by categorical limitations? If it is the risk of illness, why tie the program to capacity for hypothetical gainful activity. If it is the risk of unemployment, why tie the program to illness? The conflict in these aims and the impossibility of finding an objective measure of human capacity are the source of the program's problems, not its method of administration. Any attempts to draw conclusions about the ideal design for a bureaucracy drawn from such a program are inherently flawed.

## V. CONCLUSIONS

While Mashaw describes the problems of managing the disability program in exquisite detail, he insists that the process which produced them is basically sound and can be improved by reduction in the degree of judicial interference in the bureaucratic process. Can these problems be cured by eliminating or curtailing the role of administrative law in the adjudication of disability claims? Is the Social

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81. See R. DIXON, *supra* note 80, at 689, 710, describing studies by Saad Nagi, I. Goldsborough and others.

82. 20 C.F.R. § 404.1501-404.1599 and Appendix 1 (1983).

Security Administration's lawless adjudication process a model for other agencies to emulate? Surely not. Bad cases make bad law. The inherent flaws in the disability program explain why the accepted concepts of administrative law have been abandoned by the Social Security Administration. Administrative law requires that statutory interpretations by the bureaucracy be tested in one of two ways: regulations must be first published and subject to public comment,<sup>83</sup> and adjudications must be subject to review by an independent administrative law judge.<sup>84</sup> These procedures add to the fairness of administration by leaving the system open to consideration of new or unique factors not contemplated by the legislature or by the professional bureaucracy. When, as in the disability program, there are no clear standards, the system collapses. Every case is unique. None are clearly right, none clearly wrong and every decision displeases someone. Under these circumstances, the public perception of unfairness will not be cured by curtailing the use of administrative law which gives voice to the public's concern. It was not administrative law which created these concerns. A program which claims to fulfill an enlightened and benevolent society's obligations to its citizens cannot disappoint those expectations and be non-controversial. The disappointed unemployed who maintain the rudimentary capacity to contribute to the economy are no less hungry or in need of shelter and medical care. They are no less deserving and are indistinguishable from those who have managed to convince someone in the Social Security Administration of their eligibility. More importantly, they know that they are no less deserving or different from those who have been given access to the benefits of disability. They will not be satisfied with restructuring of the bureaucracy. What is needed is a rethinking of the appropriate solution to the social problems the disability program was intended to redress. Categorical programs, particularly those with elastic concepts like "disability" cannot solve these problems. Mashaw is simply wrong in suggesting the contrary:

The legislative standard for disability benefits is obviously the problem. And its reform is just as obviously not the solution—at least in a world having the expressed political preferences of the one we live in. To be sure, the disability judgement can be made less poignant by the addition of a negative tax or demogrant system, or by including benefits for partial disability. But these moves do not make the decisions cognitively less difficult; the lat-

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83. 5 U.S.C. § 553 (1982).

84. 5 U.S.C. § 554 (1982).

ter may, indeed, make them more complex.<sup>85</sup>

The vision here is small. The solution is reform: not reform of the bureaucracy which will always have human failings best handled by the tried and true concepts of administrative law; not the reform of the disability program in a way which will continue to distinguish between the deserving and undeserving on the basis of an ephemeral search for the truly scientific measure of human capacity. The solution is a universal program which assures employment, medical care, housing and food to all citizens not because they have proved themselves deserving or unable to support themselves, but because society as a whole benefits by not having unemployed, unhealthy, ill-fed and ill-housed citizens who are a source of discontent, disease, and crime. Most importantly, society as a whole benefits when it does not place individuals in the position of proving their inability or uselessness in order to receive food, shelter and health care. The disability program is neither healthy for citizens, society or administrative lawyers. All would benefit from a program which encourages workers to use their residual capacities rather than hide them lest they be penalized. Administrative law cannot solve the weaknesses of the disability program but may well be destroyed by it, if we follow the path Mashaw suggests.

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85. J. MASHAW, *supra* note 6, at 185.