Duke Law Journal

VOLUME 1981 APRIL NUMBER 2

CONFLICT AND COMPROMISE AMONG MODELS OF ADMINISTRATIVE JUSTICE

JERRY L. MASHAW*

In recent years there has grown a substantial, but diverse, critical literature on the administration of disability benefits under Titles II and XVI of the Social Security Act.[1] One strand of the commentary is concerned that the disability program of the Act fails to provide adequate service to claimants and beneficiaries.[2] This view implicitly characterizes the program's purposes as paternalistic and therapeutic, purposes that seem to require that healthcare, vocational, social-service, and other professionals have a major role in program administration. Commentators holding this view see the disability program's failure to emphasize the role of professional judgment, and to adopt a service orientation, as the program's major deficiency.

A second, more legalistic, perspective focuses primarily on the capacity of individual claimants to assert and defend their rights to disa-

* Professor of Law, Yale Law School; B.A. 1962, LL.B. 1964, Tulane University; Ph.D. 1969, University of Edinburgh. I would like to thank my colleagues Bruce Ackerman, Robert Burt, Owen Fiss, Jay Katz, and Peter Schuck for their helpful comments on a prior draft of this article; Deborah Ashford of the class of 1981 at the Yale Law School for her research assistance; and the Ford Foundation for its support of my empirical study of the administration of the disability benefits program under the Social Security Act.

1. 42 U.S.C. §§ 401-433, 1381-1383c (1976 & Supp. III 1979). The critical commentary is arranged here in terms of its principal preoccupations. I do not mean to suggest that the literature cited as exemplifying one critical perspective does not respond at all to the central concerns of the others.

2. *See, e.g.*, S. NAGI, DISABILITY AND REHABILITATION (1969); 1 OFFICE OF ADMINISTRATION, SOCIAL SECURITY ADMINISTRATION, REPORT OF THE SPECIAL STUDY GROUP: SERVICE TO THE PUBLIC (1971); OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, FINAL REPORT: SERVICE DELIVERING ASSESSMENT OF SSA DISABILITY PROGRAMS (1978); SUBCOMM. ON THE ADMINISTRATION OF THE SOCIAL SECURITY LAWS, COMM. ON WAYS AND MEANS, 95TH CONG. 2D SESS., DISABILITY ADJUDICATION STRUCTURE 52-92 (Comm. Print 1978).

bility benefits.[3] This literature emphasizes problems such as the inadequacy of the notices of denial sent to rejected applicants, the need for representation of claimants in disability hearings, the lack of adversary testing of the evidence provided by the participants in the adjudicatory process, and the substantial reversal rate of cases heard orally by independent administrative law judges and on review in federal courts. In sum, the concern is with the failure of the disability decision process to provide the essential ingredients of judicial trials.

A third strand of the critical literature chides the Social Security Administration (SSA) for failing to manage the adjudication of claims in ways that produce predictable and consistent results.[4] The concern is that the system may be out of control, and the suggestions for reform are essentially managerial: the SSA should provide more complete and objective criteria for the exercise of adjudicatory discretion by administrative law judges; it should gain greater control over the internal routines of state disability determination services (DDSs), which initially decide beneficiary claims; and it should strengthen the system of management oversight and quality control. In short, the literature views the system in bureaucratic and hierarchical terms and criticizes the system's inadequate management controls.

This pattern of criticism is curious. First, why do observers view the disability program's adjudicatory function in such divergent ways? Is the disagreement about the program's purposes or about the appropriate means for achieving those purposes, or both? Second, why does the criticism tend to fall into the described pattern? What unifies each perspective? Is it something specific to this program, or more general notions about administrative justice? Third, why, given the continuous and repetitive nature of the criticism—some of it from powerful public officials[5]—have Congress and the SSA not modified the program to eliminate the problems that one or all of the critics perceive?

---

3. *See, e.g.*, R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE (1973); Popkin, *Effect of Representation on a Claimant's Success Rule—Three Study Designs*, 31 AD. L. REV. 449 (1979); Yourman, *Report on a Study of Social Security Beneficiary Hearings, Appeals and Judicial Review*, in SUBCOMM. ON THE ADMINISTRATION OF THE SOCIAL SECURITY LAWS, COMM. ON WAYS AND MEANS, 94TH CONG. 2D SESS., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 125 (Comm. Print 1975).

4. *See, e.g.*, SUBCOMMITTEE ON THE ADMINISTRATION OF THE SOCIAL SECURITY LAWS, COMMITTEE ON WAYS AND MEANS, 86TH CONG., 2D SESS., ADMINISTRATION OF SOCIAL SECURITY DISABILITY PROGRAM 5-43 (Comm. Print 1960); Office of the Comptroller General, A Plan for Improving the Disability Determination Process by Bringing It Under Complete Federal Management Should be Developed (Aug. 31, 1978) (unpublished report); Office of the Comptroller General, The Social Security Administration Should Provide More Management and Leadership in Determining Who is Eligible for Disability Benefits (Aug. 17, 1976) (unpublished report).

5. See authorities cited in note 4, *supra*.

In reflecting on these curiosities I have developed some hypotheses that have interesting implications not just for the disability program but for the evaluation of administrative adjudication generally. First, I think these criticisms reflect distinct conceptual models of administrative justice. Second, each of the models is coherent and attractive. But, third, the models, though not mutually exclusive, are highly competitive. Each model's internal logic tends to drive the characteristics of the others from the field in concrete situations.

If these hypotheses are correct, a compromise model that seeks to preserve the values of and yet respond to the insights of all of these conceptions of justice will, from the perspective of each, appear incoherent and unjust. The best system of administrative adjudication that can be devised may thus fall short of our inconsistent ideals. This gloomy picture of persistent criticism and the accompanying pervasive and corrosive sense of injustice, however, may not be inevitable. Perhaps a particular conception of justice in adjudication is appropriate to a particular situation, so that we can evaluate the adjudication in that situation in terms of a single, appropriate model of justice.

But these speculations are premature. We must return to the beginning, build the models of justice to which I have alluded, and examine the claim of each to provide the dominant conception of justice in the disability program. Only then can we consider the choices actually made in that program and the stress created by those choices, and then generalize our discussion to include other administrative regimes. The discussion leads finally to the conclusion that the current dominant mode of analyzing administrative due process issues is fundamentally miscast and is in the process of being abandoned.

I. THREE MODELS OF JUSTICE

Assume, therefore, a disability program. Not just any program, but one having the general statutory features of the program embodied in Titles II and XVI of the Social Security Act.[6] The program employs medical, personal, and vocational criteria to decide whether persons are disabled.[7] A determination that a person is disabled entitles him to

6. 42 U.S.C. §§ 401-433, 1381-1383c (1976 & Supp. III 1979).

7. In the language of the Social Security Act:

> . . . an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, 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. For purposes of the preceding sentence (with respect to any individual), "work

income support and, after a waiting period, to medical benefits.[8] The eligibility determination also includes an analysis of the applicant's fitness for referral to a vocational rehabilitation program[9] and, if necessary, the scheduling of a "continuing disability investigation" to redetermine eligibility at some future date.[10] The problem of recovery from disability is cushioned by trial work periods; a return to beneficiary status requires no waiting period or reapplication.[11]

The statute also gives some guidance about the administrative structure for making disability determinations. State agencies, preferably state vocational rehabilitation services, process the claims.[12] Disappointed claimants may obtain hearings before federal administrative law judges[13] and judicial review in federal district courts.[14]

How is the implementing agency to flesh out this substantive and procedural skeleton in a just manner? The critical literature suggests three types of demands upon our disability program to achieve justice:[15] (1) that decisions be accurate and efficient applications of the legislative will; (2) that decisions be appropriate from the perspective of relevant professional cultures; and (3) that decisions be fair when assessed in light of traditional notions for determining individual entitlements. The elaboration of these demands produces three different

---

which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

Id. § 423(d)(2) (1976). *See also id.* § 1382c(a)(3)(A) and (B) for the definition of disability under Title XVI of the Social Security Act.

8. *See* Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 303, 94 Stat. 441 (1980) (amending 42 U.S.C. § 423 (1976)). Sections 103 and 104 of the same Act amend the Medicare eligibility provisions, *see* 42 U.S.C. § 426 (1976).

9. 42 U.S.C. § 422(a) (1976).

10. *See* Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 311, 94 Stat. 441 (1980), which amends 42 U.S.C. § 421(i) (1976), and provides for disability reviews every three years except when disability is permanent, in which case the Secretary is to conduct review at intervals he deems to be "appropriate."

11. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, §§ 301, 303, 94 Stat. 441 (1980) (amending 42 U.S.C. § 425 (1976)).

12. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304, 94 Stat. 441 (1980) (amending 42 U.S.C. § 421 (1976)).

13. *See* 42 U.S.C.A. § 405(b) (1980 Supp.); V. ROSENBLUM, THE ADMINISTRATIVE LAW JUDGE IN THE ADMINISTRATIVE PROCESS, RECENT STUDIES 171 (1975).

14. *See* 42 U.S.C.A. § 405(g) (1980 Supp.).

15. The "justice" of an administrative system, as I shall use the term, means simply the qualities of the system that argue for the acceptability of its decisions. I do not mean to suggest that all arguments—moral, legal, or political—are the same, or that to be just a process must avoid all complaint, even all assertions of illegitimacy. I am merely developing some distinct systems of argument. For present purposes we need not strongly distinguish among the possible sources of each system's claims to acceptability. Nor shall I attempt to demonstrate that everyone is powerfully attached to one or more of the arguments suggested. These systems should appear, once identified, familiar in legal doctrine and ordinary experience.

models of administrative justice, which I denominate respectively "bureaucratic rationality," "professional treatment," and "moral judgment." We shall now examine each of these models in the context of the disability program described above.

A. *The "Bureaucratic Rationality" Model.*

Given the legislatively approved task of paying disability benefits to eligible persons, the administrative goal from the perspective of bureaucratic rationality is to develop, at the lowest possible cost, a system for distinguishing between true and false claims. If we term the societal cost of reaching incorrect results "error costs," the goal is to minimize the sum of error costs and administrative costs.

A system focused on correctness must define the questions presented to it in essentially factual and technocratic terms. To determine whether a claimant is disabled, one must be concerned with the real world facts that relate to the truth or falsity of the claim. At a managerial level the question becomes technocractic: what is the least costly way of collecting and combining the relevant facts that will reveal the proper decision? Bureaucratic rationality, a wholly instrumental conception, excludes questions of value or preference as irrelevant to the administrative task, and views reliance on non-replicable, non-reviewable judgment or intuition as an unattractive method for making decisions. The legislature should have already decided the value questions, and making decisions on the basis of intuition would devolve authority from the bureau to individuals, thereby preventing a determination whether administrative action corresponded to reality.

This model's general way of making decisions is to retrieve and process information. In the words of Max Weber, "bureaucratic administration means fundamentally domination through knowledge."[16] Of course, this application of knowledge must in any large-scale program be structured through the usual bureaucratic routines, such as specialization and division of labor, coordination via rules, and hierarchical review of the accuracy and efficiency of decision-making.

From the perspective of bureaucratic rationality, administrative justice is accurate decision-making carried on through processes that take account of costs. The legitimating force of this conception flows both from its claim of correct implemention of legislative decisions about social welfare and from its attempt to conserve social resources for the pursuit of other valuable ends.

16. M. WEBER, 1 ECONOMY AND SOCIETY 225 (1978).

B. *The "Professional Treatment" Model.*

The goal of the professional is to serve the client. This goal is perhaps most obvious in the queen of the professions, medicine; but it is also a defining characteristic of law, the ministry, and newer professions such as social work. Although one might view the medical profession, for example, as principally oriented toward science and therefore knowledge, to do so would be a fundamental mistake. The scientific aspect of medicine, its disease and pathology constructs, is generated by the physician's attempts to treat complaints about biological and psychological functioning, pain, or deformity.[17] The physician is committed, however, to treat even those patients whose complaints cannot be explained by current medical concepts. The value the profession serves is the elimination of patients' health complaints. "Curing" a patient by eliminating a physically identifiable disease may be good science, but if the patient still feels ill, the cure is not good medicine. The objective is to use science to produce good as the patient defines it. This requires interpersonal and diagnostic intuition—clinical intelligence—as well as scientific knowledge.

An administrative system for disability decision-making based on professional treatment would therefore be client-oriented. It would seek to provide those services—income support, medical care, vocational rehabilitation, and counseling—that the client needs to improve his well-being and, perhaps, regain his self-sufficiency. Professional treatment is, of course, constrained by cost; the professional must tailor his advice or treatment to his resources. Some clients must be rejected or given less in order that others, who are needier, may be helped more. But professionals view these constraints in terms of allocation of services among clients, not as trade-offs between professional services and other social values.

Like the bureaucratic-rationality model, the professional-treatment model requires the collection of information that can be manipulated in accordance with standardized procedures. The professional-treatment model recognizes, however, the incompleteness of facts, the distinctiveness of clients' problems, and the ultimately intuitive nature of judgment.[18] Disability decisions from this perspective are not attempts to establish the truth or falsity of some fact, but rather are prognoses of the likely effects of disease or trauma on the client's ability to

17. *See, e.g.*, Engelhardt, *Doctoring the Disease, Treating the Complaint, Helping the Patient: Some of the Works of Hygeia and Panacea*, in KNOWING AND VALUING: THE SEARCH FOR COMMON ROOTS 225-49 (H. Engelhardt & D. Callahan eds. 1980).

18. *See generally* M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977).

work, and efforts to counsel and support the client while pursuing therapeutic and vocational prospects.

The basic techniques of professional treatment are personal examination and counseling. There is some specialization of functions—delegation to other professionals or sub-professionals—but the final judgment of what is to be done is holistic. The professional combines the information of others with his own observations and experience to reach conclusions that are as much art as science. Moreover, judgment is always subject to revision as conditions change or as attempted therapy proves unsatisfactory or miraculously successful. The application of clinical judgment entails a continuing relationship with the client and may involve repeated instances of service-oriented decision-making.

An administrative system based on a professional-treatment model would thus have different characteristics than a system based on bureaucratic rationality. Its basic approach is to use the appropriate professional for the problem at hand. Because these allocation decisions, involving assessment of need or ability to help, are themselves professional judgments, they are best made by the relevant professionals in conjunction with claimants. The administrative structure therefore need only funnel claimant-clients to multi-professional centers for examination and counseling. Administration of the disability program would include the facilitation of these contacts, coordination of multi-professional teams, and implementation of professional judgments about particular cases. Substantive and procedural rules, hierarchical controls, and efficiency considerations would all be subordinated to the norms of the profession.

Administration based on professional treatment differs in one other important aspect from that based on bureaucratic decision-making. Both the professional and the bureaucrat master an arcane body of knowledge and support their judgments by appeals to expertise. But whereas the bureaucrat displays his knowledge through instrumentally rational routines designed to render transparent the connection between concrete decisions and legislative policy, the professional's art remains opaque to the layman. The mystery of professional judgment is nevertheless acceptable because of the service ideal of professionalism. The element of mystery and charisma in the office of physician, priest, or lawyer is combined with the trusteeship implicit in professional-client relations. Justice, in this model, lies in having the appropriate professional judgment applied to one's particular situation.[19]

19. *See* T. PARSONS, THE SOCIAL SYSTEM 428-79 (1951).

C. *The "Moral Judgment" Model.*

The traditional goal of the adjudicatory process is to resolve disputes about the allocation of benefits and burdens. The paradigm adjudicatory situations are those of civil and criminal trials. In civil trials the contest generally concerns competing claims to property or competing claims about the responsibilities of the litigants. Property claims of "It has been in my family for generations" confront counterclaims of "I have made productive use of it." "The smell of your turkey farm is driving me mad" confronts "I was here first." The goal in individual adjudications is to decide who deserves what.

To some degree these traditional notions of justice imply that adjudication is ascertaining the facts and applying existing legal rules to those facts. So conceived, the goal of a moral-judgment model of justice appears the same as that of a bureaucratic-rationality model—factually correct applications of previously validated legal norms.[20] If this conception exhausted the notion of adjudicatory fairness, moral judgment's competition with bureaucratic rationality would be only a technical dispute about the most efficient way to find facts. But there is more to the competition than that. Whereas the bureaucratic-rationality model views decision-making as the implementation of previously determined values,[21] the moral-judgment model views decision-making as value-defining.[22] The turkey farmer's neighbor makes a valid appeal not to be burdened by the smell, *provided* that his conduct in locating nearby is reasonable, and that he is not being overly sensitive. The turkey farmer has a valid claim to carry on a legitimate business, *provided* he does not unreasonably burden his neighbors. The question is not just who did what, but who is to be preferred when specific interests, and the values to which they are connected, conflict. Similarly, the criminal trial seeks to establish not just whether a harmful and proscribed act took place, but also whether and to what extent the actor was culpable.

This entitlement-awarding goal of the moral-judgment model gives a distinctive cast to the basic issue for adjudicatory resolution: the deservedness of the parties in the context of the events, transactions, or relationships that give rise to a claim. The focus on deservedness implies certain things about a just process of proof and decision. For example, fair disposition of charges of culpability or lack of deserved-

20. *See, e.g.*, Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

21. See note 16 *supra* and accompanying text.

22. *See* Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

ness requires that claims be specifically stated and that any affected party be given an opportunity to rebut or explain. In order for this exploration of individual deservedness to be meaningful, the decision-maker must be neutral—that is, not previously connected with the relevant parties or events in ways that would bias his judgment.

Moreover, given the generally threatening nature of an inquiry into moral deservedness, parties should be able to exclude from the adjudication all information not directly related to the entitlements issue from which the disputed claim arises. This power of exclusion may take the form of evidentiary rules, of notions of standing, and, more important, may permit the parties to remove their dispute from the system by abandoning their claims or coming to some mutually satisfactory agreement on the relevant allocation.[23] The goal of the model is to resolve particular entitlements claims in a way that fairly allocates benefits and burdens, not to make a general allocation of benefits and burdens. The decision-maker is therefore passive. The parties determine how much of their lives or relationships to put in issue and what factual and normative arguments to bring to bear on the resolution of the dispute.

Although the traditional examples of entitlements-oriented individualized adjudication involve an adversary process, this feature is not critical. Claims to publicly provided benefits via non-adversary hearings processes may also conform to the model. Indeed, the Supreme Court has come very close to stating that such processes must involve a traditional oral hearing if substantive standards are so open-textured that each decision both defines the nature of the entitlement and awards or denies it to a particular party.[24]

The goals of the moral-judgment model of justice may suggest additional decisional techniques and routines designed to preserve party equality and party control of the dispute, promote settlement, and protect the authority of the decision-maker. These details need not detain us; the important point is that the justice of this model inheres in its promise of a full and equal opportunity to obtain one's entitlements. Its authority rests on the neutral application of commonly held moral principles within the contexts giving rise to entitlements claims.

As we have described them, each model of justice is composed of distinctive goals, specific approaches to framing the questions for administrative determination, basic techniques for resolving those ques-

23. *See generally* Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975).

24. *See* Califano v. Yamasaki, 442 U.S. 682 (1979).

tions, and subsidiary decision processes and routines. The distinctive features of the three models are outlined in Table A. These features are, of course, the central tendencies of the models. Particular features—and, indeed, whole models—may shade into each other at the margins.

Table A

Model of Justice	Dominant Value	Primary Goals	Decision Structure	Cognitive Approach
Bureaucratic Rationality	Instrumental rationality	Program implementation	Hierarchical	Information processing
Professional Treatment	Service	Client satisfaction	Interpersonal	Clinical application of knowledge
Moral Judgment	Fairness	Resolution of entitlements controversies	Independent	Individualized interpretation and application of norms

II. Choosing a Model for Disability Decision-Making

Choosing among these models in the disability program is not a simple matter. Each has attractive features and responds to some aspects of the statutory mandate. Congressional concern that the disability program not turn into a residual unemployment program is one important factor that would influence the choice of a model. One can expect intense pressure from applicants to expand the beneficiary class during cyclical economic downturns. The program thus requires very tight administration to maintain its integrity. The experience of private disability insurance in the 1920s suggests that adversarial adjudication pursuant to a moral-judgment model does not achieve this purpose. Several insurers were bankrupted by judicial expansion of the risks covered by their policies, and all private carriers abandoned the field when this judicial construction, in the face of rising unemployment, made the risk of "disability" actuarially unpredictable. Farming out disability determinations to the medical profession also does not seem an attractive way to structure a controllable decision process. A rational hierarchical structure might easily be viewed as the only reasonable prospect for containing the program's costs.

But we may portray the virtues of bureaucratic process in more positive terms than by contrasting it with the potential drawbacks of its competitors. The disability program is a legislative statement of a complicated, new social goal—call it "cautious benevolence." Only an organization tailored specifically to the legislative purpose is likely to

realize this goal; organizations burdened by the historic perspectives of service-oriented professions or the dominant legal culture are not likely to realize the goal. Only the bureaucratic-rationality model, it seems, promises implementation of the program rather than the pursuit of some other set of values.

The legislative goal may, however, embrace professional values and seek to funnel resources to their realization. The statutory definition of disability obviously demands professional input. The disease or trauma must be "medically determinable"[25]—a standard that contemplates delegating authority to the medical profession to establish the basic condition underlying eligibility. Moreover, for the purpose of assessing vocational capacity, Congress delegated decisional authority to state vocational rehabilitation services, presumably staffed by professional therapists and counselors. Indeed, there is evidence that Congress relied heavily on the professional rehabilitation perspective of these state agencies to constrain the awarding of benefits for permanent or long-term disablement.[26]

As a strategic matter, reliance on professional judgment also has significant advantages. Bipolar decisions (disabled/not disabled) can create enormous stress within the system unless the system includes client-oriented services that ameliorate the zero-sum nature of the game. The administrative process should therefore be structured to emphasize directing claimants to appropriate treatment. This can be done only by using the professional-treatment model.

Moreover, a professional-treatment model would not necessarily be less predictable and controllable than a bureaucratic-rationality model. A benefits program based on the bureaucratic-rationality model, employing decentralized decision-making under a vague "all things considered" eligibility criterion, would face significant problems of bureaucratic control. Unless one imagines that there is an underlying professional culture that will tend to harmonize decisional perspectives, it is reasonable to assume that the bureau will tend to pursue client interests, institutional interests, or the varied interests of the adjudicative staff, rather than congressional purposes. Real bureaucracies do not conform to the ideal type,[27] and the deviance of their behavior

25. *See* 42 U.S.C. § 423(d)(1)(A) (1976), which provides in part: "The term 'disability' means . . . inability to engage in any substantial gainful employment by reason of any medically determinable physical or mental impairment . . . ."

26. *See* Social Security Administration, Service Delivery Assessment of SSA Disability Programs (May 19, 1978) (unpublished report). *See also* M. DERTHICK, POLICYMAKING FOR SOCIAL SECURITY 303 (1979).

27. Administrative deviance from legislative purposes has spawned a vast literature in a variety of disciplines. *See, e.g.*, G. ARNOLD, CONGRESS AND THE BUREAUCRACY (1979) (political

from the ideal of bureaucratic rationality may exceed that of real professionals from the ideal of professional treatment.

A proponent of the moral-judgment model would argue that the ultimate issue in a disability determination is a value conflict about the distribution of resources. The question is not just what the claimant's skills, impairments, and experience are, but also whether persons with that particular set of characteristics ought to have public support. Bureaucrats or professionals will sometimes persuade a claimant that he is ineligible, or be persuaded that he is eligible. Those forms of administration, like compromise in civil and criminal litigation, may keep the level of formal dispute at a tolerable level. But given the complexity of the criteria to be considered and the critical interests at stake in these decisions, an acceptable resolution of the benefits question requires an opportunity for an individualized hearing and for appeal outside the bureau to a court of general jurisdiction. Moreover, it is these traditional legal forms of administration that Congress has most elaborately provided in the Social Security Act.

The evenhanded conceptual treatment of competitive justice models in the preceding paragraphs should not mislead the reader. The fundamental mode of disability administration as a historical matter was never in serious doubt. Bureaucratic rationality was to be the dominant mode to which professional treatment and moral judgment would be attached. A system of payments for Old-Age and Survivors Insurance claims was already in place, and the pre-existing structure—a bureaucratic claims-determination-plus-payment conception—was reasonably well-suited to the disability program. The Social Security Administration had a strong sense of mission in administering the Old-Age and Survivors Insurance programs, and that mission—accurate, speedy, and inexpensive disposition of claims—was no less important in the new disability program. Responsible discharge of that mission, of course, included preserving the "fund" for future beneficiaries. This responsibility made necessary a controllable, and, therefore hierarchical, decisional structure.

Historically, a program based on a model of professional treatment or moral judgment had even more decisive drawbacks than our

economy); P. BLAU, THE DYNAMICS OF BUREAUCRACY (rev. ed. 1963) (sociology); A. DOWNS, INSIDE BUREAUCRACY (1957) (political economy); W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (economics); H. SIMON, ADMINISTRATIVE BEHAVIOR (3d ed. 1976) (organization theory); THE POLITICS OF REGULATION (J. Wilson ed. 1980) (political science); March, *Bounded Rationality, Ambiguity and the Engineering of Choice*, 10 BELL J. ECON. 587 (1978) (organization theory); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971) (economics).

conceptual exploration has suggested. A delegation of broad decisional authority to medical professionals had two plausible variants, both of which were politically unattractive. The first variant of delegation abandoned budgetary control. If the SSA were to take a physician's judgment that his patient was disabled, it would necessarily forego control over the level of generosity of the program. Given either a sympathetic physician-patient relationship, or a physician's tendency not to risk a client's health, the program could mushroom. The second alternative, creation of SSA-run treatment and diagnostic centers, ran headlong into objections that it created a system of socialized medicine.[28]

There was also the obvious problem that medicine's professional concerns, diagnosis and treatment of disease or trauma, did not exhaust the facts to be considered in disability decision-making. Some official had to discover, in light of the claimant's impairments, what his residual functional capacity was and then relate that capacity to the demands of various occupations. This was a job for some kind of vocational rehabilitation specialist or job counselor. These sorts of professionals existed in state agencies, but their set of professional skills, scientific methods, and cultural norms were not nearly as unified as that of the medical profession. Outside some matrix of bureaucratic standards, the vocational professionals' decisional behavior might be unpredictable and inconsistent. Delegation to medical and vocational professionals did not seem a responsible strategy.

Nor was individualized adjudication by independent hearing officers pursuant to a moral-judgment model a politically appropriate alternative for disability determinations. The SSA was not merely a neutral decider of disability claims. It had a positive program of income security to administer and was responsible for active pursuit of information sufficient to perform its decisional task. In the words of a judge who chastised a different agency for its investigative passivity, the SSA was not "an umpire blandly calling balls and strikes."[29] This responsibility did not necessarily exclude a traditional model of adjudication, but the dynamics of such a scheme would be awkward. The SSA could retain control over factual development, for example, by adopting an approach similar to that of the Internal Revenue Service. SSA investigators would decide either to honor claims or to refer claimants to a hearing. At the hearing the SSA investigator would, of course, present the case for denial. But this would mean that disability adjudication would be adversarial, a peculiar posture for a social wel-

28. See M. DERTHICK, *supra* note 26, at 295-314.

29. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

fare agency. The SSA could hardly view itself as charged with the duty of defeating the claims of the sick, the maimed, and the developmentally retarded.

The disability program has thus adhered primarily to a bureaucratic-rationality model, but has made concessions to the other models. The statute delegated the initial disability determination to state rehabilitation agencies—an obvious but limited concession to the professional-treatment model. Both this limitation and the existing hierarchical structures were used to mold professional judgment in appropriate forms.[30]

The program also made concessions to the traditional moral-judgment model in the form of non-adversary hearings and judicial review. The disability program could not be structured otherwise and still maintain the insurance-entitlement conception of social security benefits. The compromise between bureaucratic rationality and moral judgment was thus struck, in part, in the form of a temporal separation: bureaucracy first, followed by individualized hearings for the dissatisfied. The agency's statutory mandate to provide for the support of disabled persons has, however, influenced the hearing process.[31] The hearing officer operates in an investigatory rather than passive mode, seeking out evidence, conducting an oral hearing, and ultimately deciding the case.

The external legal order has blessed this synthesis of divergent models of justice. The bureaucracy has successfully defended itself against demands for pre-termination oral hearings by relying on the involvement of medical judgments in the decision process.[32] Attempts to judicialize the hearing process by making the hearing officer passive and moving to adversary presentation have been resisted by appeal to the positive purposes of the program and to the demands of administra-

30. A compelling case for a broad delegation to professionals could have been made only if the disability program were part of a broader range of SSA-administered, health-related social services. But the SSA was not, as the Veterans Administration is, or some state social services were, a full service social-welfare administration. *See, e.g.*, S. LEVITAN & K. CLEARY, OLD WARS REMAIN UNFINISHED: THE VETERANS BENEFITS SYSTEM (1973); P. NONET, ADMINISTRATIVE JUSTICE (1969). As of 1959, when the disability program was enacted, the SSA had no medical-care component. When Medicare and Medicaid were adopted, they emerged as fee-for-service programs rather than as publicly operated health care systems. Vocational rehabilitation was historically a state function, sheltered work environments were provided largely by private non-profit organizations, and jobs programs were scattered throughout other departments. The fragmented structure of social welfare virtually foreclosed a vision of a professionally administered, service-oriented approaeh to the vocational problems of persons with impaired health and limited capacities.

31. *See* J. MASHAW *et. al.*, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978).

32. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

tive efficiency.[33] Reviewing courts have further reinforced the synthesis by requiring the involvement of professional vocational experts in the hearing process.[34]

III. A STORY OF SYSTEMIC STRESS: JUDGES AND DOCTORS AS SUBVERSIVES

Synthesis or compromise does not necessarily signal the attainment of a happy blending of justice models. Indeed, the combination of archetypes has proved very volatile as each model has sought to remain coherent by responding to its internal imperatives. The bureaucratic-rationality model's demands for accuracy and efficiency are undermined by professionals' insistence on a treatment mode[35] or by the search for moral deservedness inherent in traditional adjudication. The just-allocation goal of moral judgment is similarly lost in a system of objective rules and expertly-determined facts,[36] thereby rendering the traditional forms of adjudication useless constraints on the efficiency of bureaucratic rationality. Likewise, professional judgment constrained by objective criteria, and harnessed to the efficiency imperatives of programatic rationality, ceases to be professional judgment.[37] The story of disability administration is thus in many respects a story of systemic stress in which the supporting roles allocated to professional treatment and moral judgment place judges, doctors, and vocational experts in the role of subversives, undermining the predominant bureaucratic model.

A. *Judges and the Hearing Process.*

The history of stress and conflict resulting from the provisions of a *de novo* hearing for disappointed disability applicants is too long to recount in detail.[38] The historic position of administrative law judges (ALJs) has been that they are independent of SSA management and

33. *See* Richardson v. Wright, 405 U.S. 208 (1972) (per curiam). In *Wright* the Court refused to consider "the constitutional claim that claimants are entitled to an opportunity to make an *oral* presentation," and remanded the cause to the secretary of the SSA to implement procedures that had recently been adopted. *Id.* at 209 (emphasis in original).

34. *See* J. MASHAW, *supra* note 31, at 74.

35. *See, e.g.*, Welch, *Professional Standards Review Organizations—Problems and Prospects*, 289 NEW ENG. J. MED. 291 (1973); Willett, *PSRO Today: A Lawyer's Assessment*, 292 NEW ENG. J. MED. 340 (1975).

36. *See* Thibaut & Walker, *supra* note 22.

37. D. Stone, Professionals and Social Science (Mar. 1976) (unpublished paper on file at the Duke University School of Public Policy).

38. *See* V. ROSENBLUM, *supra* note 13. *See also* SUBCOMM. ON THE ADMINISTRATION OF THE SOCIAL SECURITY LAWS, COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER 33-55 (Comm. Print 1979).

that their function is to provide hand-crafted justice as close as possible to the traditional judicial trial, mediated by the social welfare goals of the system. Some ALJs strongly believe that their only adjudicatory guides should be the all-things-considered statutory definition of disability, evolving judicial notions of due process, and the substantial-evidence review standard.[39]

From the SSA's management perspective it is not at all clear that Congress intended SSA hearing officers to have the decisional independence that the ALJs perceive themselves to have. SSA management views itself as obligated to structure ALJ discretion by regulation and to monitor and sanction ALJ behavior in order to ensure that ALJ hearings implement the goals of the disability program. Management is concerned, in short, with the error-proneness and inefficiency of ALJ hearings. Congress has brought intense pressure on the SSA to reduce the time it takes to process claims,[40] and a major cause of delay is the hearing process. Moreover, ALJs are, as a group, much more lenient in granting claims than are state disability examiners. Claimants who request *de novo* reconsideration by state agencies of initial denials obtain an award about fifteen percent of the time. Those claimants who are unsuccessful at this stage and then request a *de novo* ALJ hearing obtain an award in over half of their appeals.[41] This situation poses a clear threat to the underlying bureaucratic process. Because requesting and obtaining a hearing is virtually costless, there is little to prevent an ultimate shift of control of the program to the ALJs via a nearly 100% appeal rate. Their model of justice could thus triumph.

This systemic stress has, in the past few years, caused SSA management to respond in an almost schizophrenic fashion. On the one hand, the SSA proposed,[42] but subsequently withdrew,[43] regulations that would have provided for representation for the government in ALJ

39. These views rarely, if ever, appear in print. In interviews with several dozen ALJs, however, I have repeatedly encountered this perspective on independence.

40. *See, e.g.*, SUBCOMM. ON THE ADMINISTRATION OF THE SOCIAL SECURITY LAWS, COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., APPEALS PROCESS: AREAS OF POSSIBLE ADMINISTRATIVE OR LEGISLATIVE ACTION 1-18 (Comm. Print 1975). Legislative interest in the delay issue ultimately produced section 308 of the Social Security Amendments of 1980, which requires the SSA to establish timeliness standards. Pub. L. No. 96-265, § 308, 94 Stat. 458 (1980). Some reviewing courts have imposed their own standards. *See, e.g.*, White v. Mathews, 559 F.2d 852 (2d Cir. 1977).

41. The actual figures for the Title II disability insurance program in fiscal year 1979 are 17.3% before state agencies and 56.7% before ALJs. SOCIAL SECURITY ADMINISTRATION, ANNUAL REPORT FOR FISCAL YEAR 1979 4 (1980).

42. *See* Notice of Proposed Rulemaking, "Experiments to Improve the Hearing Process by Having SSA Represented at the Hearing," 45 Fed. Reg. 2,345 (1980).

43. *See* Notice of Withdrawal as of July 14, 1980, 45 Fed. Reg. 47,162 (1980).

hearings. This proposal called for an abandonment of the historic non-adversary posture of Social Security administration in a desperate gamble to deal with ALJs by evening up the odds. On the other hand, at the same time that it was proposing these regulations, the SSA instituted several measures designed to bring ALJ hearings under greater managerial control and to orient ALJs to accuracy and efficiency, the goals of rational bureaucratic implementation. These measures included establishing a program to review ALJ performance, setting monthly production targets, and instituting a quality assurance program to monitor ALJ decisions and reversal rates.[44] This activity prompted one ALJ to file a class action, alleging that the practices infringed on the ALJs' decisional independence.[45]

The ALJs' pending suit illustrates the basic point being made here—the hearing process fits uneasily into the bureaucratic scheme. If the ALJ hearing is to be closely controlled by substantive rules, procedural routines, and management oversight, the ALJs are correct to wonder why the Administrative Procedure Act's[46] trappings of a formal hearing and a neutral judge are appropriate. A hearing to apply objective criteria subject to management supervision has little of the legitimating symbolism of the proverbial "day in court." But if the logic of decisional neutrality and individual moral deservedness is to dominate the hearing stage, the SSA may be unable to maintain control over the program. The bureaucratic-rationality and moral-judgment models of justice do, indeed, compete. The logic of one cannot be played out without destroying the other; blending them necessarily produces stress—and perhaps incoherence.

B. *Doctors and Vocational Experts.*

Protecting the bureaucratic-rationality model from displacement by the professional-treatment model has not been nearly as difficult as fending off the progressive logic of individualized adjudication. The SSA easily met the jurisdictional challenge of the treating physician.

---

44. *See* Nash v. Califano, 613 F.2d 10, 12-13 (2d Cir. 1980).

45. Nash v. Califano, 613 F.2d 10 (2d Cir. 1980). From what I know of the quality assurance program, the ALJ's complaint exaggerates the danger of infringement. *See* Chassman & Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801 (1980). Only large deviations from the production targets produce even an inquiry from the Office of Hearings and Appeals (OHA). The monitoring of reversal rates is not an attempt to assign every ALJ a 50% reversal rate as the complaint in *Nash* implies. *See* Nash v. Califano, 613 F.2d at 13. Rather, the quality-assurance data plus special validation studies demonstrate that the most error-prone judges are those whose reversal rates deviate most from the mean. Deviance is therefore used as a basis for inquiry and counseling.

46. 5 U.S.C. §§ 551-559 (1976).

Disability examiners are required by regulation to ignore conclusions of treating physicians concerning a claimant-patient's capacity to work.[47] The examiner carefully analyzes the treating physician's reports for his clinical findings, but the examiner seeks evidence, not professional judgment, concerning the therapeutic desirability of continued work. The runaway costs that decisions based on risk-averse medical advice might entail are thus avoided. This defensive strategy, however, raises an equally troublesome problem—how to maintain sufficient connections with the relevant professional cultures to generate the high-quality information necessary to a bureaucratically rational mode of operation.

To see how this problem arises, we must break the disability judgment into its component parts. Clinical findings of the existence of disease or trauma are the statutory precondition for a determination of disability, but the disability decision requires the following determinations as well: (1) the degree to which disease or trauma has produced impairments in the claimant's physical or mental structure; (2) the degree to which these impairments result in activity losses or restrictions, usually characterized as "functional limitations"; (3) the degree to which the claimant's impairments and functional limitations affect the required capacities for the performance of his normal roles and activities, and (4) the interaction of the claimant's age, education, and prior work experience with his functional limitations and his response to them, and the effect of this combination of factors on his functional capacity for work available in the national economy.[48] The treating physician's reports or records may well proceed from clinical findings to specification of an impairment. But rarely will they go beyond that. The critical question is the claimant's "functional capacity," and the SSA recognizes at least four possible ways to gather information about that issue:[49] (1) the treating physician could make an evaluation based on his examination; (2) the claimant could be sent to a consulting physician for examination and evaluation; (3) the claimant could be placed in a vocational workshop for observation, testing, and evaluation; and (4) doctors employed by the SSA could prepare a residual-functional-capacity evaluation based on the medical evidence in the claims file.

Approaches 1 and 3 would place critical decision-making in the therapeutic context. They have been rejected because they would put

47. 20 C.F.R. §§ 404.1504, 404.1526 (1980).

48. *See id.* §§ 404.1504, 404.1523, 404.1524.

49. *See generally* SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION & WELFARE, DISABILITY INSURANCE STATE MANUAL, PART II: PROCESSING OF DISABILITY CASES §§ 200-48 (1977).

the SSA at the mercy of external professional judgment. Approach 2 might appear to be a nice compromise. It would employ a medicine-as-diagnostic-science model that avoids the problems of a service-oriented treatment culture, yet provides evidence from a physician who at least has examined the patient. The budget for consultative examinations is not sufficient, however, to buy a million a year. And even if the SSA substantially increased its demand for consultative examinations, it is not clear that physicians would be willing to supply them at anything remotely resembling present prices. Doctors generally dislike doing SSA consultations because they are not connected to therapy. In many ways the medical profession sees the SSA consultative examination as a misuse of medical resources, and many doctors refuse to perform them at all. State agencies have a continuous problem of maintaining a respectable list of consulting physicians.[50]

The SSA's predominant way of determining the claimant's residual functional capacity is, therefore, approach 4.[51] But this, of course, is not information collection at all. It is a physician's evaluation of the claimant's capacity to work based merely on the medical data in the file. The evaluations may or may not accurately characterize a particular claimant. Physicians who review files and fill out residual-functional-capacity forms for state agencies freely admit that their findings are largely an artifact of bureaucratic necessity, not an exercise of clinical judgment.[52] The cost of avoiding the professional-treatment model of justice in this manner is, thus, a systematic absence of information critical to disability determination.

In a sense, avoiding capitulation to a competing model undermines the bureaucratic-rationality model itself. The apparent need for professional judgment identifies a soft spot in bureaucratic rationality's goal of accuracy—some facts cannot be found reliably by objective testing alone. Instead one determines what risks of making an erroneous characterization of the facts one is willing to run. This question is answered with reference to one's values. That the SSA avoids the therapeutic considerations that might skew risk-taking in the direction of generous provision of benefits reveals that the agency itself is making value choices. It ultimately must decide not whether a particular

50. This was a constant refrain in my interviews with the chief medical officers of four state agencies. Claims examiners made similar complaints, as well as complaints about recurrent shortages of funds with which to purchase consultative exams.

51. This is the operational choice. It is not codified in the DISABILITY INSURANCE STATE MANUAL, *supra* note 49.

52. This statement is based on the unvarying responses of physicians employed by three state agencies in different parts of the country in which I conducted extensive interviews.

claimant *can* work—there is no direct evidence on that question—but whether that claimant *should be expected* to work.

The delegation of power to state vocational rehabilitation professionals produces similar stress and a response that ultimately deprofessionalizes judgment—that is, removes it from the therapeutic context. To understand why this has occurred requires consideration of the institutional context of rehabilitation services. Those services are scarce. Their measure of success is job placement. Rehabilitation professionals will, like treating physicians, be conservative in their estimates of a claimant's work potential; if the claimant is provided services but cannot ultimately be placed, resources have been wasted. When there is doubt about the likely response to rehabilitation, the safe course is to provide a disability pension. This is particularly so in the view of the state vocational professional because rehabilitation services come partially from state funds, while the disability pension is composed entirely of federal dollars.

Obviously, if the SSA is to retain control of the definition of disability, and thereby the fiscal integrity of the program, it must avoid making decisions in the predictable mode of the state rehabilitation counselor. The story of how this has been acomplished is, in a sense, the history of the administration of the disability system. That tale cannot be recounted here.[53] Suffice it to say that the current state agency process is so nearly federal and so divorced from the line activity of state rehabilitation services that a visit to a state disability determination service reveals little about the historic association of disability adjudication and vocational rehabilitation.

Yet the divorce of disability determination from vocational rehabilitation has not fully relieved the stress generated by the competing professional model. Because the determinations are separated, an individual may be found too disabled to receive vocational rehabilitation services but insufficiently disabled to receive disability benefits. The disappointed applicant will view the decisions as unjust, not merely ironic. Moreover, federal courts have been unwilling to grant the divorce in certain circumstances. When claimants are denied benefits at the hearing level on the grounds that they can engage in some employment other than their prior employment, the courts insist that the finding of capacity to do other work be supported by evidence in the record. The only way the SSA can produce such evidence is to call a

53. *See* H.R. REP. No. 96-944, 96th Cong., 2d Sess. 54 (1980), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2606.

vocational expert—usually a vocational rehabilitation counselor—as a witness.[54]

In relying on vocational experts as witnesses, however, the SSA again confronts the problem of the delegation of decision-making to the therapeutically-oriented professional. How is the judge to ask whether the claimant can perform a new job without conceding the decisional role to the expert witness, who will presumably give the response of the professional, therapeutic culture? The system's answer is to put a series of hypothetical descriptions of the claimant before the expert and ask for a conclusory response to each. The ALJ may then, if necessary, manipulate the findings of fact to fit the real claimant to the hypothetical that elicited what the ALJ believes to be the correct conclusion. Production of the judicially-required evidence thus may take on the character of a charade,[55] further demonstrating that in the disability scheme, the professional-model confronts, and in some sense threatens, both the bureaucratic-rationality and moral-judgment models of justice.

IV. PROCEDURAL DUE PROCESS FROM A MODELS-OF-JUSTICE PERSPECTIVE

We have, thus far, been discussing our three models in a context, the disability program, that offers generous scope for each model's claim to provide the appropriate model of justice in administrative adjudication. Certainly a number of real-world administrative agencies seem to conform to one or another of each of the ideal types.[56] I sus-

54. *See* J. MASHAW, *supra* note 31, at 82-89.

55. Claimants certainly view this exchange about hypothetical persons as peculiar. Indeed, they are so inclined to see the vocational counselor as performing a professional service role that many administrative law judges specifically state, when introducing the vocational expert at the hearing, that the counselor is there as a witness and not for the purpose of counseling or placing the claimant.

56. A motor vehicle safety inspection bureau might exemplify the bureaucratically rational agency. The goal is to keep unsafe vehicles off the road. The bureau may define "unsafe vehicle" in terms of objective mechanical or physical characteristics. Each inspection decision matches these characteristics to a particular vehicle and approves or disapproves the vehicle's continued operation. The bureau's infra-structure seeks to make the inspection decisions accurately and to contain costs. The bureau may define costs as direct administrative or budgetary costs or may include such items as motorists' time and convenience. The bureau may even seek to calibrate its efforts to match inspection costs and accident prevention gains at the margin. *See* W. CRAIN, VEHICLE SAFETY INSPECTION SYSTEMS: HOW EFFECTIVE? (1980).

Public hospitals and legal services agencies are examples of the professional-treatment model in operation. The professional-treatment features of public hospitals, legal services programs, and the like are, of course, somewhat attenuated. The content of the service ideal, in particular the willingness to consider interests beyond the treatment or counseling of a particular client, will have different emphasis in public institutions than in private professional practice and will vary from institution to institution. But the core of the professional model remains. The dominance of

pect, however, that the competition we have observed in the disability program is also present in a wide variety of other programs. In fact, viewing a number of commonplace administrative law issues as examples of the competition among models of administrative justice may contribute to the understanding and resolution of those issues. I have gathered these familiar issues under the general heading of "procedural due process" although, as we shall see, they do not all raise constitutional questions, and the analysis offered here entails what some would surely consider a "substantive due process" approach.

Consider, for example, cases in which parties challenge the method an agency or legislature has used to decide particular issues. Such a challenge might be framed as an attack on agency rulemaking power, as a protest against the use or development of "bright line" standards in the course of adjudication, as an attack on the adequacy of rulemaking processes, or as a claim to procedural due process. At the heart of each controversy, whatever its formulation, lies a conflict between the bureaucratic-rationality model's view of adjudication as a straightforward fact-finding process, emphasizing accuracy and efficiency, and the moral-judgment model's view of adjudication as a value-realizing process tied inextricably to the deservedness of the affected parties.[57]

---

the service ideal and the professional-client relation are visible in the autonomy of the individual lawyer or doctor once the physician-patient or lawyer-client relationship is established. *See, e.g.*, Bellow & Kettleson, The Politics of Scarcity in Legal Services Work, 36 NLADA Briefcase 5 (1979). An administrative superstructure may determine the total resources available for treatment, counseling, or litigation, but the use of these resources is governed by a professional judgment that responds to culture and training acquired independently of the agency and the agency's mission. The professional defines and legitimates the actions of the agency, rather than the other way around. M. LARSON, *supra* note 18, at 190.

Agencies whose organization conforms to the moral-judgment model cover the familiar terrain of traditional federal administrative law practice. The National Labor Relations Board, the Federal Trade Commission, and the Federal Communications Commission spring readily to mind. Each administers a vague statute and elaborates, in contested cases, the operational content of concepts such as "fairness," *see, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976); National Labor Relations Act, 29 U.S.C. § 151 (1976), or "the public interest," *see, e.g.*, Communications Act of 1934, 47 U.S.C. § 309(a) (1976).

The preceding discussion of the disability program will probably make us suspicious that beneath the surface of these seemingly ideal agencies some competition among models could be identified. Indeed, if we recognize that the relentless attempt to achieve a particular goal, be it "rationality," "service," or "fairness," surely involves denying the importance of one or more of the others, we may prefer such a competition to a tidy structure based on a single model.

57. If I understand him correctly, Lawrence Tribe has a similar view on the basic issue in at least some of these cases. *See* Tribe, *Perspectives on* Bakke: *Equal Protection, Procedural Fairness, or Structural Justice*?, 92 HARV. L. REV. 864 (1979); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

In cases such as *National Petroleum Refiners Association v. FTC*,[58] *United States v. Storer Broadcasting Co.*,[59] and *FPC v. Texaco, Inc.*,[60] the complaining parties attacked the power of the agency to adopt rules that restricted the scope of inquiry in subsequent adjudicatory proceedings. In *National Petroleum* the Federal Trade Commission had adopted a rule requiring station owners to post octane ratings for gasolines on all retail gas pumps. In *Storer Broadcasting* the Federal Communications Commission had adopted a rule prohibiting owners of five communications outlets from obtaining other outlets. In *Texaco* the Federal Power Commission had adopted a rule that certain clauses in contracts for the sale of natural gas would preclude the issuance of certificates for interstate pipeline transmission of the gas. Affected parties in all three cases claimed that they were statutorily entitled to a trial-type hearing about whether their practices or proposed operations were "unfair," "deceptive," or not in the "public interest" under the relevant legislative language.[61] It followed, they argued, that the agencies could not foreclose full adjudicatory explorations of the fairness or suitability of the behavior in question by rulemaking.[62] The reviewing courts disagreed and stated that effective administration may demand the particularization of general standards through rulemaking. To find that the agencies lacked the asserted rulemaking power, the courts reasoned, would interfere with the efficient discharge of their regulatory tasks.[63]

Having lost the battle on agency power to adopt bright-line rules foreclosing subsequent adjudicatory exploration of value questions, the proponents of adjudicatory procedure attacked the standard rulemaking process under the Administrative Procedure Act[64] as insufficiently adjudicatory. The claim in cases such as *Florida East Coast Railway v. United States*[65] may be vulgarized as stating simply, "If we cannot challenge the relationship between the policy underlying these rules and our particular situation in proceedings applying the rules, we should at least have an adversary proceeding to discuss those issues at the rulemaking stage." The Supreme Court firmly rejected this request

58. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

59. 351 U.S. 192 (1956).

60. 377 U.S. 33 (1964).

61. FPC v. Texaco, Inc., 377 U.S. at 44; United States v. Storer Broadcasting Co., 351 U.S. at 202; National Petroleum Refiners Ass'n v. FTC, 482 F.2d at 674, 675-76.

62. FPC v. Texaco, Inc., 377 U.S. at 44-45; United States v. Storer Broadcasting Co., 351 U.S. at 202; National Petroleum Refiners Ass'n v. FTC, 482 F.2d at 675-76.

63. FPC v. Texaco, Inc., 377 U.S. at 44; United States v. Storer Broadcasting Co., 351 U.S. at 202; National Petroleum Refiners Ass'n v. FTC, 482 F.2d at 697.

64. 5 U.S.C. § 553 (1976).

65. 410 U.S. 224 (1973).

for judicialization of rulemaking and, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[66] admonished the Court of Appeals for the District of Columbia Circuit that the Administrative Procedure Act established the maximum procedural requirements that Congress was willing to have the courts impose on agencies in conducting rulemaking proceedings.[67]

The complaints about inappropriate modes of action may also run in the opposite direction. In *NLRB v. Wyman-Gordon Co.*[68] and *NLRB v. Bell Aerospace*[69] the Supreme Court rejected the argument that the National Labor Relations Board should not do its rulemaking in individual adjudicatory proceedings. The following justice-oriented claim is lurking in these cases: "The Board should not be permitted to determine that we have behaved unfairly in a proceeding directed against us on grounds that have nothing to do with our blameworthiness. If the Board wants to make general policy in the form of prophylactic rules that enhance the efficiency of its regulation, it should do so in a proceeding that signals that effective administration, not our culpability, is the topic under discussion."[70]

We may contrast the preceding cases with a line of cases that are considerably less deferential to the agency's or legislature's choice of decision-making procedure. These contrary cases are the "irrebuttable presumption"[71] cases, and include *Bell v. Burson*,[72] *Stanley v. Illinois*,[73] and *Cleveland Board of Education v. LaFleur*.[74] In *Bell*, for example, Georgia had adopted legislation barring from the highways persons who had been involved in accidents and had no liability insurance. The plaintiff, a driver suspended under the statute, claimed that the state had deprived him of due process of law by adjudicating his fault, or fitness to retain his license, without a hearing. The Supreme Court agreed.[75] In *Stanley*, Illinois law provided that children of unwed fathers become wards of the state upon the mother's death, thereby presuming that the father was unfit to raise the children. The Court held that due process requires an individual determination of an unwed

66. 435 U.S. 519 (1978).

67. *Id.* at 524.

68. 394 U.S. 759 (1969).

69. 416 U.S. 267 (1974).

70. *See id.* at 291-92; 394 U.S. at 765-66.

71. In such cases the complaining parties assert that legislative rules require the finding of facts that, at least to them, are untrue. The legislation has thus created an "irrebuttable presumption" that precludes the party from obtaining a fair hearing on a material issue of fact.

72. 402 U.S. 535 (1971).

73. 405 U.S. 645 (1972).

74. 414 U.S. 632 (1974). *See also* Vlandis v. Kline, 412 U.S. 441 (1973).

75. 402 U.S. at 542.

father's fitness.[76] Similarly, in *LaFleur* the Court held unlawful a school-board rule requiring all pregnant teachers to take maternity leave five months before the expected birth. The Court held that a pregnant teacher was entitled to an individual determination of her continuing fitness to teach.[77]

The first interesting aspect of these cases is obvious—they are contrary to the well-entrenched administrative law doctrine illustrated in the previous cases that bright-line rules may be employed to foreclose adjudicatory exploration of particular issues. That the challenged rules were in some cases adopted by state legislatures rather than by administrators merely deepens the puzzle. The Court has even applied the irrebuttable-presumption doctrine to congressional legislation.[78]

Of course, the irrebuttable-presumption decisions not only fail to comport with cases like *Storer Broadcasting*; they also do not fit the general mold of constitutional law doctrine. If a bright-line rule may not replace a general principle unless the rule perfectly effectuates the principle, then most legislation and regulation, state and federal, is unconstitutional. Apparently recognizing this, the Court appears to have abandoned irrebuttable-presumption analysis without ever cogently explaining the grounds for either its original use or its ultimate rejection.[79] Yet the juxtaposition of the traditional administrative law jurisprudence and the irrebuttable-presumption cases cries out for some meaningful response. When is it necessary to engage in an individual inquiry into deservedness, and when may a rule transform the adjudicatory inquiry into an efficient, fact-seeking one?

We may make some progress in understanding these two seemingly incompatible lines of decisions by characterizing them in terms of a competition between our bureaucratic-rationality and moral-judgment models of justice. If the adjudication purports to allocate benefits and burdens on the basis of individual deservedness, the moral-judgment model is more appealing. If the decision process does not directly or impliedly raise deservedness issues, a rule-bound and fact-oriented bureaucratic process will suffice.[80] Viewed in this manner, *Stanley*, for

76. 405 U.S. at 657-58.

77. 414 U.S. at 647-48, 651.

78. *See* Department of Agriculture v. Murry, 413 U.S. 508 (1973).

79. *See* Weinberger v. Salfi, 422 U.S. 749, 768-74 (1975); *id.* at 802-04 (Brennan, J., dissenting). *But see* Elkins v. Moreno, 435 U.S. 647, 658-62 (1978).

80. I do not, of course, want to say that every situation that can be described in "individual deservedness" terms demands a fully textured, open-ended adversary inquiry. Characterization of what is at stake can be slippery, as our disability insurance discussion illustrates. Furthermore, even when adjudication implicates individual deservedness, it is not clear that some rule enunciating a set of quasi-objective criteria, as a substitute for individualized inquiry, is not a wise re-

example, is clearly distinguishable from *Storer Broadcasting*. A rule that deems one an unfit parent has very different individual deservedness implications than a rule that forbids certain concentrations of communications ownership regardless of who the owners are. Storer Broadcasting may think that the concentration rule is silly, but it can hardly view the rule as defamatory.

A models-of-justice analysis reveals that the procedural issues in these cases are inseparable from, and dependent upon, the substantive issues. The question of appropriateness of the mode of proceeding must be addressed from a perspective that considers the goal of the program. Until one discerns the dominant and subsidiary substantive goals of a program, he cannot evaluate the appropriateness of its procedures.

In a sense, the Supreme Court has recognized this dependence. Justice Brennan's opinion in *Bell v. Burson*[81] assumed that the nature of the substantive question determines the process required. He concluded that, under the Georgia statutory scheme, the question of the individual driver's fault, and therefore, his potential liability, was a critical issue for determining the driver's continuing eligibility to hold a license.[82] Because there was no argument that being involved in an accident was a reasonable substitute for fault, and because the existing administrative hearing did not permit an inquiry into fault, the scheme was irrational. Justice Brennan's penultimate paragraph[83] made clear that the Georgia legislature could cure the defect either by making the procedure fit the substance of the licensing scheme or by altering the scheme's substance to eliminate the question of fault.

Bell did not require distinguishing between models of justice. Excluding the fault issue from the hearing, without developing some adequate substitute for factual inquiry, seems arbitrary whether one is pursuing administrative justice in a bureaucratic-rationality or moral-

sponse to the difficulties of managing adjudicatory discretion, evidentiary uncertainty, or skewed error costs. Consider, for example, the consistency problem faced by the SSA, *see* J. MASHAW, *supra* note 31, at 19-27; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 41-45 (1977); or the sentencing problems of the criminal justice system, *see* A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). Evidentiary uncertainty was a factor in Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979); Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); and Starr v. FAA, 589 F.2d 307 (7th Cir. 1978). *See also* Act of Dec. 29, 1979, Pub. L. No. 96-171, 93 Stat. 1285. For a discussion of skewed error costs, see Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

81. 402 U.S. 535 (1971). See text accompanying notes 75 *supra*.

82. 402 U.S. at 541.

83. *Id.* at 542-43.

judgments model. But more complicated situations may require, when dealing with statutory interpretation or constitutional due process requirements, a recognition of divergent models of justice. Otherwise the judiciary will be unable to offer a coherent explanation for its imposition of process constraints. Indeed, it may impose such constraints unnecessarily. Consider *Califano v. Yamasaki*[84] and *Department of Agriculture v. Murry*.[85]

Yamasaki involved a demand for an oral hearing as a prerequisite to SSA recoupment of overpayments from Social Security disability beneficiaries. The Social Security Act authorized recoupment of overpayments by deduction from future monthly benefits. Section 204(b) of the Act prohibits recoupment, however, if adjustment or recovery would tend either to "defeat the purposes" of the Act or to "be against equity and good conscience."[86] The Department of Health, Education, and Welfare had, by rule, defined "equity and good conscience" to mean detrimental reliance on the incorrect amount when the beneficiary was in "good faith" and without "fault."[87] An overpayed beneficiary could apply for a waiver of the recoupment. Under the challenged scheme, both the determination that overpayment had occurred and the decision on a waiver application were made without providing the beneficiary with any personal access to the decision-maker. Beneficiaries could, however, obtain a subsequent oral hearing before an administrative law judge.

Adopting the bureaucratic-rationality or "error costs" approach to due process questions that has been dominant since *Mathews v. Eldridge*,[88] the *Yamasaki* Court approved the SSA's procedure for determining the existence of overpayments without a hearing: "[T]he rare instance in which a credibility dispute is relevant to a[n overpayments] claim is [not] sufficient to require the Secretary to sift through all requests for reconsideration and grant a hearing to the few that involve credibility."[89] In short, the increased accuracy was not worth the cost.

The Court viewed the waiver question differently, however. It read the statute to require an oral hearing on waiver petitions prior to recoupment.[90] Yet, while sensing that the overpayment question and the waiver question were different, the Court pursued the waiver issue

84. 442 U.S. 682 (1979).
85. 413 U.S. 508 (1973).
86. 42 U.S.C. § 404(b) (1976).
87. 20 C.F.R. § 404.509 (1980).
88. 424 U.S. 319 (1976).
89. 442 U.S. at 696.
90. *Id.* at 695.

within the *Mathews* bureaucratic-rationality mode of analysis. The result was unconvincing and arguably erroneous. First, the Court gave the waiver provision a strained reading, stressing the statute's "imperative voice" in stating that "there shall be no [recoupment]"[91] from any person who qualifies for waiver. Initially the argument seems to be that the legislature has demanded absolute accuracy in every case. Thus far *Yamasaki* is reminiscent of irrebuttable-presumption analysis. But if pressed, the Court would have to admit that eligibility conditions in a statutory benefits program could hardly be precatory; the imperative voice is standard drafting.

Therefore, in the bureaucratic-rationality mode, the distinction between the approved overpayments determination and the disapproved waiver determination must turn either on differences in the likelihood of error or on the power of hearings to produce accurate fact-finding. The Court, though, had no data on either of these issues; it was thus forced to rely on lawyers' conventional wisdom:

> As the Secretary's regulations made clear, "fault" depends on an evaluation of "all pertinent circumstances" . . . . Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.[92]

Perhaps this is so, but it is unclear how the Court knows it. Experienced judges have testified vigorously that the traditional oral confrontational process enhances accuracy very modestly, if at all.[93] Furthermore, the Court does not know that any increased accuracy will be worth the cost. Is cost irrelevant because of the statute's "imperative" instruction to get it right? What does it mean to establish accurately someone's good or bad faith, fault or faultlessness? Are these characteristics facts, or are they moral conclusions?

Obviously I believe that the Court would have done better to rest its distinction between the overpayment and fault determinations on grounds relating to appropriate models of justice. The importance of the statutory language lies not in its imperative tone, but in the type of justice it presumes. "Equity and good conscience," "good faith reliance," and absence of "fault" presuppose a search for the motivational basis of individual behavior judged against basic community standards of honesty and fair dealing. That such a search should occur exclusively on paper, without an opportunity for conversation that can pro-

91. *Id.* at 693-94.

92. *Id.* at 697.

93. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

duce understanding not only in the sense of knowledge of the facts, but also in the sense of a recognition of common humanity and shared values, is at best peculiar. There is no obvious reason to presume that the legislature meant to depersonalize the development and implementation of common moral principles.

Nor did the legislature do so. It provided for a full oral, non-adversary hearing before an administrative law judge. The question confronting the Court, therefore, was merely one of timing. And, if the question that calls forth the demand for a personal, oral hearing is not the recovery of money, but the moral judgment that provides the premise for that recovery, the conventional learning in due process "stigma" cases indicates that a subsequent hearing will suffice.[94] Hence, a shift in rational or analytic perspective is not merely an interpretive exercise. It may produce a different result as well.

Department of Agriculture v. Murry[95] further illustrates the confusion that can result from the Court's failure to recognize that different administrative schemes may be based on different models of justice. The Food Stamp Act provided that if a household contained children over eighteen who were claimed as dependents for income tax purposes by someone not in the household, the household would be ineligible for food stamps during the following year.[96] The Court, relying on *Stanley* and *Bell*, held that the Act created an irrebuttable presumption that the existence of need in a household for a particular year was negated by tax dependency reported elsewhere for the previous year. Because the dependency clause did not provide a hearing to rebut this presumption, the Court held that the clause violated due process.[97] Four justices dissented in *Murry*; three of them went for the jugular. They accused the majority of engaging in *Lochner*-esque[98] substantive due process review.[99]

From a models-of-justice perspective, the dissenters were correct. There was no basis in the food stamp legislation for preferring the moral-judgment model of justice. Although "entitlements" in some sense of the word were in issue, food stamp awards are not made on grounds of moral deservedness. The eligibility criterion is income level. Any such program must have budget-unit rules and those rules,

94. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974).

95. 413 U.S. 508 (1973).

96. Pub. L. No. 91-671, 84 Stat. 2048 (1971) (until struck down, codified at 7 U.S.C. § 2014(b) (1976), *as amended by* Pub. L. No. 95-113, § 1301, 91 Stat. 962 (1977), Pub. L. No. 96-58, § 2, 93 Stat. 390 (1979)).

97. 413 U.S. at 514.

98. *See* Lochner v. New York, 198 U.S. 45 (1905).

99. *See* 413 U.S. at 522-27.

like the more familiar income tax budget-unit rules, will misclassify some dependency-support relationships. Although the legislature arguably made fault pertinent in *Bell*, and the Constitution made the fitness of a natural parent pertinent in *Stanley*, there was no similar basis for invoking the moral-judgment model of justice in *Murry*.

The appropriate model of justice, therefore, was bureaucratic rationality. As the Court has elsewhere recognized, there is no constitutional requirement that a bureaucracy's combination of substantive rules and adjudicating procedures get every case right. The requirement is simply that the trade-off between error and process costs not be obviously unbalanced.[100] Bureaucratic rationality promises efficient, not perfect, implementation. Had the Court recognized that the *Bell-Stanley* approach rejects the appropriateness of the bureaucratic-rationality model only when certain substantive issues are at stake, it could have analyzed the *Murry* claim in a more sensible fashion. *Bell* and *Stanley* should be viewed as combining substantive and procedural due process analyses to demand a model of justice appropriate to the substantive entitlement involved, not as demanding perfectly rational bureaucratic administration.[101]

V. CONCLUSION

We have discussed several due process cases in terms of a conflict between the bureaucratic-rationality and traditional moral-judgment models of justice. In a sense, this conflict represents the paradigmatic

100. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

101. If we turn the models-of-justice analysis back on conventional administrative law cases such as *Storer Broadcasting, Florida East Coast Railway*, and *Bell Aerospace*, one thing seems clear: It is difficult to imagine grounds for constitutionalizing a moral-entitlements model with respect to any of the activities at issue in the major cases. The question in all of them is merely the strength of the legislature's programmatic commitment to a moral-entitlements perspective. In the cases involving a clear grant of rulemaking power, for example, there is no justice claim to hybridize that process by tacking on elements of adjudicatory process.

The problematic cases from a justice perspective have been those in which the older agencies (the FTC, FCC, FPC, and NLRB) seek to shift from a historic all-things-considered adjudicatory stance to a more bureaucratic efficiency-oriented posture, making objective bright-line rules the vehicles for their departure. The cases are problematic because though these agencies engage in licensing or prosecutorial-adjudicatory functions under general standards suggesting that entitlements will be determined in accordance with common or developing moral standards, the agencies also have at their origin notions of policy development and implementation based on specialized experience and technical expertise. *See generally* J. LANDIS, THE ADMINISTRATIVE PROCESS (1938). From the viewpoint of our competing models of justice, these agencies thus appear, like the disability program, to have a hybrid base. It is therefore not surprising to find opponents attacking either apparent shifts toward bureaucratic rationality via rulemaking or the development of per se rules in adjudicatory proceedings. Nor is it surprising that the courts, recognizing the hybrid nature of the enterprise, have generally left the procedural choice to the agency's discretion.

administrative due process claim. Viewing due process issues as competitions among models of justice implies that the basic question is not which technique is more accurate, but which is more appropriate to the question to be resolved. There is thus an inextricable link between substantive and procedural due process.[102]

The competition, therefore, is not merely between the bureaucratic-rationality and moral-judgment models. The professional-treatment model is also creeping into due process analysis. The *Mathews* Court's reliance on the integrity of the medical diagnostic process and the importance of medical evidence in disability claims is one such indication. Similarly, in *Parham v. J.R.* [103] the Court relied heavily on the treatment orientation of psychiatrists and clinical psychologists as a major protection for juveniles presented for admission to state mental-health facilities.[104] It may be, of course, that the Court misunderstood the role of physicians in the disability decision process in *Mathews* or was too sanguine about the professional role of state-employed physicians in *Parham*. But these errors, if they are errors, do not suggest that the Court should recognize only one model of administrative justice, the moral-judgment model or the bureaucratic-rationality model.

Rather, such concerns suggest that the Court should begin to work with more robust notions of alternative justice models in its due process analyses. If the Court agrees with defenders of the bureaucratic or professional status quo that individualized adjudication based on general community values poorly fits a programatic context, that should not signal the end of the discussion. As this article has sought to demonstrate, we can describe and investigate the attractive features of each of the approaches to administrative justice in different settings. That an ideal bureaucratic or professional regime is more appropriate for a particular agency than a more broadly-based moral-judgment scheme does not mean that the agency's bureaucratic or professional regime is adequate.

Conversely, that a particular regime diverges substantially from the bureaucratic or professional ideal need not mean that conventional legal process—something like the moral-judgment model—should always be substituted for it. A modified version of a more appropriate model is often preferable. The Court need not function in administrative due process cases as if it were constrained to choose between the

102. I have discussed this linkage elsewhere from a primarily substantive perspective. *See* Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980).

103. 442 U.S. 584 (1979).

104. *Id.* at 607-13.

legal chauvinism of a ubiquitous demand for trial-type procedure and an unexamined deference to administrative or legislative choice of some alternative mode of decision-making.

Recent cases like *Yamasaki* and *Parham* suggest that the Court will not make this mistake. The Court is obviously sensitive to the limitations of traditional legal process in promoting accuracy and is increasingly restive with the attempt to force all administrative due process issues into the *Mathews* error/cost-balancing mold. In order to deal effectively and convincingly with the myriad administrative process claims that it surely will continue to see, the Court needs to recognize that the conflict is not a straightforward contest between bureaucratic imperatives or professional prerogatives and traditional notions of fair trials, but a competition among contending and complex models of administrative justice.