ADMINISTRATIVE PATERNALISM: SOCIAL SECURITY'S REPRESENTATIVE PAYMENT PROGRAM AND TWO MODELS OF JUSTICE

*Margaret G. Farrell**

TABLE OF CONTENTS

* Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. This Article is based on research conducted by the author as a consultant to the Administrative Conference of the United States ("ACUS") between September 1989 and January 1991. The author is grateful to Professors David Gray Carlson, Marci Hamilton, Michael Herz, Michel Rosenfeld, and Elliott Weiss of the Cardozo Law School faculty, as well as Professors Geoffrey Miller, Gary Minda, Martha Minow, Joshua Schwartz, and Peter Strauss, who made helpful comments on earlier drafts.

INTRODUCTION

I told them that I did not want a payee, because I did not need a payee. I've been handling my own AFDC checks for 9 years.

They told me if I did not have a payee, I would not get my checks, and I told them that I cannot find a payee . . . . And I went back home and I just, you know, stayed there for a couple of days, and I thought to myself, well, this isn't right. . . . So I went back to the Social Security office . . . [a]nd they said that there was nothing they could do. . . . I hope that the Congress and other people here will help us so that we don't get stuck like this, and for others in the world, too. (Elizabeth Freeland, Social Security beneficiary, June 6, 1989)[1]

---

[1] *SSA's Representative Payee Program: Safeguarding Beneficiaries from Abuse: Hearing Before the Special Comm. on Aging*, 101st Cong., 1st Sess. 16-17 (1989) [hereinafter *Hearing*] (statement of Elizabeth Freeland, Social Security beneficiary). Ms. Freeland gave the following oral testimony before the Committee:

> I went to the Social Security office to apply for Social Security, and they told me come in to fill out the applications. I went in with a lady that was staying with me . . . . [This woman and her five children had been staying with me after she had been evicted from her home. She had lived with me for only approximately six weeks at that time. I was letting her stay with me rent free because I felt sorry for her and she had nowhere else to go.] [T]he applications were filled out, and then they told me that I had to have a payee. I told them that I did not want a payee, because I did not need a payee. I've been handling my own AFDC checks for 9 years.
>
> They told me if I did not have a payee, I would not get my checks, and I told them that I cannot find a payee, or anyone to be a payee. Then, once again the worker said if you do not get a payee then you cannot have your checks.
>
> [The woman who was with me volunteered to be my payee upon the suggestion of the Social Security worker. I told the worker I did not want her or any other person to be my payee. . . . I hoped that she would properly handle my benefits and I knew of nothing in her history at that time that would make her unsuitable to act as my payee.]
>
> The check had come and the payee did not tell me. She went to the store and cashed the check, and I went back to the Social Security office and told them, and asked them if my check had come. And they said, yes, you have to talk to your payee. I went to the payee and I told her I would like to have my check. And she said that it's here. And I said, well, why didn't you tell me it came, and she said, because I didn't—she didn't say why. She'd given me $1,700, what was left out of the check. The check was for $2,200, and we went to a bank—we went to two banks to try to deposit the money in a checking account. Come to find out that she could not because she was in trouble for writing bad checks. So then we went back to my home the same day, and then the next day she asked her boyfriend to put the money in the bank.
>
> Well, apparently, I guess he did, but come to find out later that he did not. He has spent the money to go on a trip to Ohio. I went back to the Social Security office and I reported it to them, and I told them that my payee is taking off with my money, and that she is no longer in my home. And they said that there was nothing that they could do about it. And I went back home and I just, you know, stayed there for a couple of days, and I thought to myself, well, this isn't right. So

The concept of legal paternalism is not new. The Anglo-American legal tradition includes many examples of state action justified as necessary to protect individuals from self-inflicted harm or as necessary to guide them toward their own good, whether they consent or not.[2] What is unusual, and relatively unexplored, is the development and imposition of paternalistic policies by a federal administrative agency. One of a few examples of such administrative paternalism is the Social Security Administration's representative payee program. In 1939, Congress authorized the Social Security Administration ("SSA") to pay social security benefits to friends, relatives, or qualified organizations when the "interest of [the beneficiary] would be served thereby . . . ."[3] The resulting representative payee program currently pays over $20 billion in social security benefits annually to

---

I went back to the Social Security office, and I told them I would like to have something done. And they said that there was nothing that they could do.

And so, I had a check coming in January. It was in my name and my payee's name. I had to return that check back to the Social Security Administration, and then my benefits were suspended for 4 months. I lived off of an AFDC grant for one person [$311 a month], which was for my daughter and myself. It was very hard to live off of that much money. I had to let several bills go unpaid. I had to go without medication that I needed for myself, and it was just extremely hard.

And so I went back to the Social Security office and I told them that I want to be my own payee. I cannot find anybody to be my payee, and they said that there was nothing that they could do, to go find a lawyer. They also gave me some papers to fill out to return to my doctor that I could be my own payee. I took those papers to my doctor and within 1 week, the papers were back in the Social Security office. They had called me to come back in, and I have become my own payee, and I hope that the Congress and other people here will help us so that we don't get stuck like this, and for others in the world, too.

And I appreciate it very much for all of you inviting me here. Thank you.

Id. at 16-18 (bracketed material is from Ms. Freeland's prepared statement).

[2] JOEL FEINBERG, SOCIAL PHILOSOPHY 45 (Elizabeth Beardsley & Monroe Beardsley eds., 1973).

[3] Social Security Act Amendments of 1939, ch. 666, § 205(j), 53 Stat. 1360, 1371 (current version at 42 U.S.C. § 405(j)(1)(Supp. II 1991)). Section 205(j), pertaining to benefits payable under Title II of the Social Security Act, states in relevant part:

> If the Secretary determines that the interest of any individual under this subchapter would be served thereby, certification of payment of such individual's benefit under this subchapter may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her use and benefit, to another individual, or an organization.

Social Security Act § 205(j), 42 U.S.C. § 405(j)(1)(Supp. II 1991).

Section 1631(a)(2), pertaining to benefits payable under Title XVI of the Social Security Act, states in part:

> (i) Payments of the benefit of any individual may be made to any such individual or to his eligible spouse (if any) or partly to each.
>
> (ii) Upon a determination by the Secretary that the interest of such individual would be served thereby, or in the case of any individual or eligible spouse referred to in section 1382(e)(3)(A) of this title [(that is, section 1611(e)(3)(A) of the Act)], such payments shall be made, regardless of the legal competency or incompetency

representatives of more than four million Americans.[4]

For fifty years the SSA has administered the representative payee program with little attention or criticism. Very often, such indirect payments to friends and relatives provide beneficiaries welcome relief from the burdens of managing day-to-day financial affairs. Recently, however, the rights of beneficiaries to fair determinations with regard to the selection of trustworthy payees and adequate accountings have been hotly debated in both legislative and judicial forums. In 1988 and 1989, several cases concerning payee abuse received notoriety.[5]

A United States District Court in Colorado ordered the SSA to compensate a beneficiary whose $7,945 lump sum disability benefits were stolen by a representative payee whose criminal background the agency had failed to investigate.[6] In California, a woman who had previously been convicted of social security fraud was indicted for the murder of eight social security beneficiaries residing in her board and care home, at least one of whom was a beneficiary for whom she had been appointed payee.[7] Another United States District Court ruled that the SSA's failure to require payees to account for benefits that they administered violated the constitutional rights of beneficiaries.[8] The United States Court of Appeals for the Ninth Circuit found that "a grim image of homelessness and hunger" and extortion by aspiring "trustees" resulted from the SSA's suspension of benefits when the SSA could not find payees available to assist incapable beneficiaries.[9]

---

of the individual or eligible spouse, to another individual, or an organization . . . for the use and benefit of the individual or eligible spouse.

Social Security Act § 1631(a)(2), 42 U.S.C. § 1383(a)(2)(A)(Supp. II 1991) (originally enacted as Social Security Amendments of 1972, Pub. L. No. 92-603, § 1631(a)(2), 86 Stat. 1329, 1475).

[4] *See infra* notes 30-36 and accompanying text.

[5] *See, e.g., Hearing, supra* note 1; Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989); Jordan v. Bowen, 808 F.2d 733 (10th Cir. 1987), *cert. denied*, 484 U.S. 925 (1987); Holt v. Bowen, 712 F. Supp. 813 (D. Colo. 1989). The SSA convened an intra-agency Representative Payment Task Force in September 1988 to deal with the issues presented. Margaret G. Farrell, Administrative Conference of the United States: The Social Security Administration's Representative Payee Program: Problems in Administrative Paternalism 7 (Apr. 1991) (unpublished report, prepared for the consideration of the Administrative Conference of the United States ("ACUS"), on file with the *Cardozo Law Review*). ACUS recommendations regarding the SSA representative payee program are found at 1 C.F.R. § 305.91-3 (1992).

[6] *Holt*, 712 F. Supp. at 819.

[7] *See Use of Representative Payees in the Social Security and Supplemental Security Income Programs: Hearing Before the Subcomm. on Social Security and the Subcomm. on Human Resources of the Comm. on Ways and Means*, 101st Cong., 1st Sess. 48 (1989) [hereinafter *Representative Payee Hearings*] (statement of Curtis L. Child, Staff Attorney, Legal Services of Northern California, Inc.).

[8] *See* Jordan v. Schweiker, No. 79-994-W (W.D. Okla. Mar. 17, 1983); *see also* Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984); *infra* note 191.

[9] *Briggs*, 886 F.2d at 1136.

At Congressional hearings, public administrators voiced the fear that unscrupulous family members may become representative payees for older relatives in order to use the beneficiaries' funds to finance their own drug and alcohol addictions.[10] While not typical, these situations have caused concern that the SSA's inadequate system of payee selection too often fails to operate in the best interests of beneficiaries, fails to detect unqualified payees, creates homeless people when it suspends payments altogether because no suitable payee can be found, fails to properly monitor the payees' disbursements, and fails to recover misappropriated benefits.[11]

After House and Senate hearings, Congress, in the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), dealt directly with specific administrative issues involved in representative payment, but left unaddressed other, more fundamental issues about the objectives of the program.[12] Nevertheless, this reformist approach cannot be invoked consistently or effectively to structure the administration of a large, complex, dynamic program like representative payment. This Article proposes that Congress establish clear policy objectives for representative payment to guide the SSA in administering the program. Without such direction, the agency's overall failure to either effectively protect the personal autonomy of beneficiaries or to provide them needed management assistance calls into question the very legitimacy of its imposition of representative payment.[13]

The SSA's representative payee program presents a rare opportunity to consider the legal bases, justifications, and consequences of the exercise of administrative paternalism on the federal level.[14] Although much attention has been paid to the regulation of commercial behavior by administrative agencies, little attention has been

---

10 *See Representative Payee Hearings*, *supra* note 7, at 150 (statement of Stuart White, Legislative Director, Michigan Office of Services to the Aging on the Representative Payee System).

11 *See Hearing*, *supra* note 1, at 16-17 (statement of Elizabeth Freeland describing many of these problems in her statement to Congress).

12 *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5105, 104 Stat. 1388-254 to -265 (codified at 42 U.S.C. §§ 405(j), 1383(a)(2) (Supp. II 1991)); H.R. CONF. REP. NO. 101-964, 101st Cong., 2d Sess. 928-31 (1990).

13 *See generally* James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1044-45 (1975).

14 Representative payment is not paternalistic in the pejorative sense, but in its original, familial sense where an authority provides assistance and protection to certain dependents as a father provides for and regulates the lives of his children. *See* 11 THE OXFORD ENGLISH DICTIONARY 336 (2d ed. 1989). The resolution of these issues in the SSA's representative payee program may well establish substantive and procedural principles that will shape future paternalistic efforts on the federal level, including other federal payment programs that utilize the representative payee mechanism. *See infra* note 142 and accompanying text.

given to the administrative regulation of personal behavior through paternalistic programs like representative payment. And, while there has been extensive study of the administration of social welfare programs, such as the SSA's disability insurance program,[15] these studies do not examine the issues presented by paternalistic regulation. Social welfare programs do not impose assistance upon the unwilling, and they regulate personal behavior only indirectly, through the offering of incentives; representative payment, in contrast, regulates directly. Thus, the administration of the representative payee program presents significantly different legal and philosophical issues than those presented by the social security entitlement programs.[16] Because of the large number of beneficiaries involved in representative payment, the adjudication of their interests by the SSA presents some of the same questions about the agency's ability to provide "mass justice" that are presented by administration of the entitlement programs.[17] Furthermore, many procedures adopted by the SSA to administer the representative payee program are the same as those

---

[15] *See, e.g.*, DANIEL J. BAUM, THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE (1974); DONNA P. COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS (1985); ROBERT G. DIXON, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION (1973); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199 (1990). Although these and other administrative, constitutional, and jurisprudential issues posed by administration of federal payment programs have been thoroughly explored, those raised by social services programs involving representative payment have not.

[16] Principles of procedural fairness applied in SSA payment programs, such as the disability program, are not apposite to the issues raised by representative payment for several reasons. First, unlike most other benefits provided by the federal government, the assistance of a representative payee certified by the SSA is a benefit to which there is no entitlement; there are no established criteria that, if met, will entitle a beneficiary to the assistance of a payee. The Secretary is simply authorized, and not required, to certify representative payment when he or she finds it in a beneficiary's "interest." Second, the government may impose protection of representative payment on an unconsenting beneficiary who has no desire to receive it. While entitlement to monetary benefits is not at issue in representative payee determinations, autonomy interests in controlling benefits, as well as self-esteem, standing in the community, and the ability to function in society are often at issue. Third, the monetary benefits involved in representative payment determinations will be paid by the Secretary whether or not the beneficiary is found to need a representative payee. Thus, the government's only financial interest in representative payment determinations is the minimization of administrative costs. Finally, the SSA's determinations that beneficiaries are incapable of managing their affairs are much like determinations of incompetence made for guardianship and commitment purposes, which are traditionally made by the judiciary exercising state *parens patriae* powers rather than by a federal administrative agency carrying out a congressional exercise of spending power.

[17] It is estimated that SSA makes about 300,000 to 500,000 payee determinations each year. Telephone Interview with Fred Graf, Social Security Administration Payment Specialist (Dec. 15, 1989). For analyses of mass justice issues, see sources cited *supra* note 15.

used to determine individual eligibility to receive benefits. However, representative payment is not an entitlement. Rather, it implicates an interest in receiving or not receiving social services—assistance in expending benefits—as opposed to an interest in receiving money payments. Thus, the procedures used to carry out the agency's authority to award benefits are not necessarily appropriate when used to carry out its authority to impose or provide representative payment. Nevertheless, administration of representative payment authority has been vested in an agency whose historical mission has been making accurate and efficient money payments, and that has little, if any, experience in providing social assistance.

This Article is divided into five parts. Part I describes the representative payment program and its relation to the objectives of the social security programs. Part II discusses the concept of paternalism and the values it sets in conflict. The SSA's standards and procedures are then measured against two conceptual models of justice, defined by the two values—autonomy and beneficence—put in conflict by paternalism. Part III evaluates the SSA's imposition of indirect payment in accordance with a legal justice model that is exemplified by state guardianship, and is intended to protect the individual autonomy of beneficiaries. Part IV evaluates the agency's performance in providing payee services in accordance with a model of therapeutic justice exemplified by the veterans' fiduciary program. In finding that the representative payment program conforms to neither the legal model nor the therapeutic model, part V concludes that without direction from Congress as to which one of the conflicting values is to be furthered by the program, the SSA's administration lacks rationality and coherence. Furthermore, part V recommends that Congress reconsider the desirability of continuing this form of administrative paternalism at the federal level.

I. THE REPRESENTATIVE PAYMENT PROGRAM

The Social Security Act provides both insurance benefits and assistance payments to millions of Americans. Title II provides insurance benefits to the aged and the disabled (and their dependents and survivors) who have purchased insurance through mandatory payroll deductions during their working years.[18] Title XVI provides income

[18] Social Security Act §§ 201-209, 42 U.S.C. §§ 401-433 (1988 & Supp. II 1991). Beginning in 1939, Title II of the Social Security Act provided monthly benefits to retired workers, their dependents (usually spouses and children), and their survivors. Social Security Act Amendments of 1939 § 202, 42 U.S.C. § 402 (1988). Since 1960, Title II has also provided monthly benefits to disabled social security taxpayers who become permanently and totally

assistance to some of the nation's needy persons under the Supplementary Security Income Program ("SSI").[19] The Secretary of the Department of Health and Human Services ("HHS") is given broad discretion to make either direct or representative payments to legally competent or legally incompetent Title II beneficiaries or Title XVI recipients when the Secretary determines that the "interest of [the beneficiary] would be served thereby . . . ."[20] The dual nature of the Social Security Act as both an insurance program and a welfare pro-

---

disabled. *See* Social Security Amendments of 1960, Pub. L. No. 86-778, § 401(a), 74 Stat. 967 (current version at 42 U.S.C. § 423 (Supp. II 1991)). *See generally* STAFF OF COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 3-8, 41-59 (Comm. Print 1989) [hereinafter BACKGROUND MATERIAL]. Workers are compelled under the Federal Insurance Contributions Act ("FICA") and the Self-Employment Contributions Act of 1954 to contribute to the social security trust fund through employer-matched payroll and self-employment taxes during their working years. *See* I.R.C. §§ 3101-3128, 1401-1403 (1992). When workers retire, die, or become disabled, monthly cash benefits are paid under Title II as a matter of earned right or entitlement to those workers who are insured for benefits and to their eligible dependents and survivors. In December 1988, there were 38.6 million beneficiaries receiving old age, survivor, and disability insurance payments under Title II totalling $18.7 billion. *See* BACKGROUND MATERIAL, *supra*, at 3-4. The average annual payment for an individual retired worker in 1988 was $501. 1989 SSA ANN. REP. TO CONGRESS 29.

[19] Social Security Act §§ 1601-1634, 42 U.S.C. §§ 1381-1383 (1988 & Supp. II 1991). The SSI program is a federal program established in 1972 to provide monthly income assistance payments to persons determined to be needy in accordance with federally established eligibility criteria. Social Security Amendments of 1972 § 1611, 42 U.S.C. § 1382 (1988). *See* BACKGROUND MATERIAL, *supra* note 18, at 671-73. In order to become eligible, a person must be at least sixty-five years of age or be blind or disabled, and have an income and assets below certain benefit standards. The regular federal SSI benefit standard for an individual for 1988 was $355 a month and is indexed to the Consumer Price Index ("CPI"). In addition, in order to be eligible for SSI payments, an individual may not have assets of more than $2,000, excluding certain assets such as the individual's home, household goods, car, and burial space. Thus, there can be overlapping eligibility under the Act. For instance, a person may receive old age insurance under Title II, but have so little income that he qualifies for old age income assistance payments under SSI. All but eight states supplement the federal benefit standard to establish a combined state-federal standard against which eligibility is measured. In 1989, these state supplementations varied from zero to $384 per month in Connecticut and supplemented the federal payment for about 42% of the nation's SSI recipients. *See* BACKGROUND MATERIAL, *supra* note 18, at 679-80. Seventeen states have elected to contract with the SSA to administer their supplementary payments.

[20] 42 U.S.C. §§ 405(j)(1), 1383(a)(2)(A)(ii) (Supp. II 1991). In addition, Congress has required that all SSI beneficiaries who qualify for payment on the basis of a disability determination supported by a finding of drug or alcohol abuse *must* receive representative payment. Social Security Act § 1611(e)(3)(A), 42 U.S.C. § 1382(e)(3)(A) (1988). The legal authority of the Secretary to appoint a payee to expend Title II and Title XVI benefits has been characterized as a "lattice of statutes, regulations and procedures[,] . . . intricate, even confusing . . . [in which] there is an extra level of complexity, for there are two separate statutory schemes, with different criteria governing payment to someone other than the beneficiary ('representative payment,' in the parlance of the Secretary) . . . ." Briggs v. Sullivan, 886 F.2d 1132, 1134 (9th Cir. 1989).

gram colors the debate about the propriety of limiting an individual's control over his or her benefits and the procedures used to effectuate those limitations. Persons who have earned insurance benefits through their payments during working years may make greater claims to procedural and substantive protection than persons who have become dependent upon the state for maintenance by virtue of their inability or failure to "purchase" insurance through work. On the other hand, the Supreme Court has weighed the interests of welfare recipients more heavily than those of beneficiaries of the insurance programs in determining the procedural due process to which each is entitled in other social security programs.[21] Whether this distinction should find expression in the representative payee program depends upon the purposes that the program is intended to accomplish.

Congress has never articulated the fundamental goals of representative payment but has granted the SSA broad discretion to implement them. The agency has adopted several bases upon which it might find that a beneficiary's interest would be served by representative payment. Even though the statute authorizes the Secretary to make direct or representative payment regardless of the legal competence or incompetence of the beneficiary, the Secretary has issued regulations that require payment to a representative payee for most children and for most adults determined incompetent by a state court.[22] In addition, representative payment will be ordered if a physician or the SSA claims representative in the beneficiary's local social security office believes a beneficiary is incapable of managing his or her own financial affairs.[23] In the exercise of its discretion, the SSA has adopted procedures to apply these criteria—which parallel those used to determine eligibility for cash payment programs—despite the fact that representative payment implicates interests in personal liberty and in receiving social services rather than monetary interests.[24] Thus, after a claims representative has determined that a beneficiary is incapable of managing his or her benefits and after a payee has been selected, the SSA gives the beneficiary "advance notice" of its determination and provides the beneficiary with a period of time to review the evidence, provide additional evidence, and "protest" the determi-

---

21 Thus, the Supreme Court weighed more heavily the interests of welfare beneficiaries who would be "destitute" without funds, Goldberg v. Kelly, 397 U.S. 254, 261 (1970), than the interests of disability beneficiaries whose eligibility for benefits does not depend on financial need, Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976).

22 20 C.F.R. § 404.2015 (1992); *see infra* notes 64-73 and accompanying text.

23 *Id. See also infra* notes 74-79 and accompanying text.

24 *See infra* notes 81-118 and accompanying text.

nation before it is implemented. If the incapability determination is confirmed by a claims representative after protest by the beneficiary, it is regarded as an "initial determination" and is implemented immediately, unless the beneficiary seeks reconsideration. The beneficiary then receives a "formal notice" of the action. The beneficiary may request "reconsideration" by the claims representative and may request de novo review of that determination by an administrative law judge ("ALJ"), with a right to both an administrative appeal to the SSA Appeals Council and judicial review pursuant to provisions of the Social Security Act.[25]

When no suitable payee is available, the SSA often suspends the payment of benefits to the beneficiary until a payee is found, and then makes a lump sum payment to the newly appointed payee of the back benefits to which the beneficiary is entitled.[26] All payees are required to account to the SSA annually by filing a one-page form indicating whether they have expended funds in the beneficiary's interest.[27]

Payees who are found by the SSA to have misused benefits may not appeal the agency's finding but are rarely either required to pay restitution to the beneficiary or prosecuted criminally.[28] Where the agency believes that it has been negligent in investigating or appointing a payee, it may repay misused funds to the beneficiary or a subsequently appointed payee.[29]

Although statistical data about the representative payee program has been kept inconsistently, the data appears to show that about 10.5% of all social security benefits—more than $20 billion annually—is paid to representative payees.[30] About four and a half million beneficiaries, or 10% of all social security beneficiaries, receive their benefits through a representative payee.[31] A quarter of all adult beneficiaries who have representative payees are aged. Most of these beneficiaries are receiving insurance payments under Title II.[32] More than

---

25 *See infra* notes 96-108 and accompanying text.

26 *See infra* notes 162-70 and accompanying text.

27 *See infra* notes 190-91 and accompanying text.

28 *See infra* notes 197-205 and accompanying text.

29 *See infra* notes 209-13 and accompanying text.

30 *See* 1988 SSA ANN. REP. TO CONGRESS; *see also* 1990 SSA ANN. REP. TO CONGRESS 23-27.

31 *See* 1990 SSA ANN. REP. TO CONGRESS 27. In 1989, a total of 34.9 million retired workers and family members received old age and survivor benefits, and 4.1 million workers and family members received disability insurance under Title II of the Act. There were also 1.4 million workers and family members who received old age assistance and 3.1 million who received assistance to the blind and disabled under the SSI program. In total, 43.6 million people received benefits from the SSA. *Id.* at 23-26.

32 SSA, BENEFICIARIES WITH REPRESENTATIVE PAYEES (Dec. 1988) [hereinafter BENEFICIARIES WITH REPRESENTATIVE PAYEES] (on file with the *Cardozo Law Review*). In 1989,

a third of all adult SSA beneficiaries with representative payees are institutionalized in nursing homes or custodial facilities.[33] Although the SSA did not collect or refine data about payees serving beneficiaries until recently, most payees apparently are relatives or friends. About a quarter of all beneficiaries with payees have an institution or public official serving as payee.[34] Only a small portion of the adult beneficiaries determined by the SSA to be incapable of handling their own affairs have been determined legally incompetent in a state court proceeding and thus have a court-appointed guardian or conservator.[35]

These figures represent a significant increase in the SSA's use of representative payees in the last decade.[36] This increase is likely to continue as an increasingly larger portion of the nation's population is over the age of 65;[37] as more formerly institutionalized mentally ill

---

8.5% of the persons receiving insurance benefits were paid through representative payees, as were 26% of all SSI beneficiaries. *See* 1990 SSA ANN. REP. TO CONGRESS 23-27. In 1988, of the 38.6 million people receiving Title II benefits, approximately 8.73% were in the representative payment program. Of these, approximately one-third were adults and two-thirds were children under eighteen years old. Of the 4.1 million receiving SSI payments in 1988, approximately 32.6% were in representative payment. Of these, approximately two-thirds were adults and one-third were children, excluding those who were also receiving benefits under Title II. *See* 1989 SSA ANN. REP. TO CONGRESS 28-32; BENEFICIARIES WITH REPRESENTATIVE PAYEES, *supra*.

In 1985, women over sixty-five years old represented over 25% of all adult Title II beneficiaries with representative payees. *Id.* However, older adults do not constitute as large a portion of SSI beneficiaries for whom representative payees have been appointed. In 1987, 13% were over sixty-five years old. *See* SELECT COMM. ON AGING, 100TH CONG., 2D SESS., SURROGATE DECISIONMAKING FOR ADULTS: MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES: A REPORT PRESENTED BY THE CHAIRMAN OF THE SUBCOMMITTEE ON HOUSING AND CONSUMER INTERESTS OF THE SELECT COMMITTEE ON AGING at ONE-5 n.14 (Comm. Print 1988) [hereinafter SURROGATE DECISIONMAKING].

33 Thirty-nine percent of all adult Title II beneficiaries with representative payees are institutionalized, and 34% of SSI beneficiaries with representative payees are institutionalized. BENEFICIARIES WITH REPRESENTATIVE PAYEES, *supra* note 32.

34 *Id*; *see also* OFFICE OF RESEARCH AND STATISTICS, SSA, SSI REPRESENTATIVE PAYEE MI LISTING (Sept. 21, 1989) (on file with the *Cardozo Law Review*). Residential institutions (such as nursing homes, retardation facilities, board and care facilities, and mental hospitals), social service agencies, or public officials were appointed payees for 345,000 or 26% of adult Title II beneficiaries with payees and 207,000 or 34% of adult SSI beneficiaries with payees. BENEFICIARIES WITH REPRESENTATIVE PAYEES, *supra* note 32.

35 Of the 1.9 million adult beneficiaries reported by the SSA to be in representative payment in December 1988, only 169,000 or 8.9% had been determined legally incompetent, 140,000 of them received Title II benefits, and 28,000 received Title XVI benefits. BENEFICIARIES WITH REPRESENTATIVE PAYEES, *supra* note 32.

36 The portion of Title II adult beneficiaries determined incapable of managing their affairs increased from 2.82% in 1973 to 3.26% in 1985. Similarly, the number of adult SSI beneficiaries with representative payees increased from 9.17% to 19.49% from 1975 to 1983. SURROGATE DECISIONMAKING, *supra* note 32, at ONE-5 n.14.

37 U.S. SENATE SPECIAL COMM'N ON AGING ET AL., AGING AMERICA: TRENDS AND

and mentally retarded people—both elderly and nonelderly—are returned to the community;[38] and as nursing homes increasingly condition admission on the imposition of a guardianship or other surrogate decision-making arrangement (such as the appointment of a trustee, representative payee, attorney-in-fact, or guardian) so that nursing homes can deal directly with family members or financial institutions rather than their residents.[39] Resolution of the issues presented by the SSA's efforts to provide assistance to these aged and disabled populations in managing their benefits may well provide a model for other paternalistic efforts by the federal government.

II. PATERNALISM: THE PROBLEM OF CONFLICTING VALUES

The representative payment system, as it is currently administered, can be seen as ambivalent, straddling two separate models of procedural justice that this Article calls the legal model[40] and the

---

PROJECTIONS 2, 7 tbl. 1-2 (1991). Although the population as a whole increased 11% in the 1970s, the population over sixty-five increased 28%, to almost 30 million people or 12% of the present population. It is estimated that by 2050, the population over sixty-five will comprise 22.9% of the population or 68 million people. *Id.* at 7 tbl. 1-2. In addition, the portion of the elderly who are eighty-five and older has increased even more dramatically—in the 1970s their numbers increased 59%. The likelihood that they will need help in managing their financial affairs is even greater. *Id.*

[38] *See generally* WINSOR C. SCHMIDT ET AL., PUBLIC GUARDIANSHIP AND THE ELDERLY 7-23 (1982); John A. Talbott, *A Special Population: The Elderly Deinstitutionalized Chronically Mentally Ill Patient*, 55 PSYCHIATRIC Q. 90 (1983).

[39] SURROGATE DECISIONMAKING, *supra* note 32, at ONE-15, ONE-16. Because there is incomplete data on the number of persons under state guardianships (the number is sometimes estimated to be between 300 and 500 thousand), it is difficult to determine the total number of children and adults who are subject to either guardianship or representative payee arrangements. It is even more difficult to secure data on the number of persons whose affairs are managed by trustees, professional financial managers, and persons with powers of attorney. Nevertheless, statistics on persons subject to representative payees appointed by the SSA suggest that their numbers are significant and growing.

[40] The legal model of justice might as easily be called the judicial or adjudicatory model. It is a model, worked out by courts, premised on the proposition that an adversarial procedure for truth finding, the presentation of reasoned argument, and the application of law to facts are most likely to produce acceptable resolutions of disputes. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 351, 364-71 (1978). It has been partially embodied in concepts of constitutional due process through case by case adjudication of the procedural rights due litigants when different interests are at stake. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970). Common characteristics of the model are a right to notice of the matter in dispute; an opportunity to be heard, right to present testimony and other evidence, and right to confront adverse witnesses; right to a reasoned decision by a neutral decision maker; and right to an appeal when justified. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 489 (1972). *See also infra* notes 51-60 and accompanying text. As implemented in the Anglo-American tradition, the model privileges liberty and property interests by placing the burden of proof and persuasion on state and other parties who would affect the liberty and property interest of individuals. Thus, an acceptance of autonomy as a more important value than beneficence militates in favor of the adoption of a legal model

therapeutic model.[41] The legal model safeguards autonomy and liberty interests through trial-like adjudicatory procedures. The therapeutic model assures assistance and care to those objectively determined by the state to be in need, particularly when their need stems from a lack of capacity to control behavior which vitiates their interest in autonomy. The SSA's institutional ambivalence about adopting these models—unchecked by the Social Security Act, professional expertise, electoral accountability, or the Constitution—does much to undermine the legitimacy of the SSA's determinations.

The problem of the government's paternalism— the provision of protection and assistance to certain persons, with or without their consent— can be viewed as a contest of interests. On the one hand, western societies value autonomy or the capacity for self-determined behavior.[42] On the other hand, individuals create societies in order to have access to certain benefits, including assistance, when they become weak or dependent.[43] Thus, we value social beneficence as an effort to benefit people solely for their sake and not for the sake of

---

of adversarial justice and for the protection of autonomy interests when they are implicated by paternalistic efforts of the state.

41 The therapeutic model of justice is almost a medical model premised on the proposition that those who have the ability to provide needed assistance to others have a moral duty to provide it, even if assistance is not requested or accepted by the beneficiary. The model calls for the establishment of fact-finding and decision-making procedures that rely heavily on concepts of objective need, unreviewed expertise, fiduciary responsibility, and service. *See infra* notes 121-23 and accompanying text. Thus, a government that imposes assistance and protection involuntarily upon persons who do not appreciate the benefit has been termed a therapeutic state, whereas a state which merely offers assistance which can be refused is referred to as a welfare state. NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 41 (1971).

42 In this Article, the term "autonomy" is used to mean independent, self-controlled, or self-governed thought and behavior, especially moral independence, limited by neither internal nor external constraints. For an exposition of "autonomy" as freedom of the will, see IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39-57 (Lewis W. Beck trans., 1959) (1785). The concept of autonomy as freedom of action is developed by John Stuart Mill in JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 86, 99 (Everyman's Library 1951) (1859). "Liberty" is used in this article to mean autonomy, legally protected from interferences by the state, and "freedom" is used to mean autonomous thought and action without external restraint imposed by others. The value placed on autonomy interests is supported by the libertarian premise, posited by John Locke and others, that all persons are endowed with a natural right to freedom from restraint by others. *See* JOHN LOCKE, *An Essay Concerning Civil Government*, *in* TWO TREATISES OF GOVERNMENT 269 (Peter Laslett ed., student ed. 1988) (1690).

43 This perceived duty to protect and promote the welfare of others has several philosophical bases. Utilitarians, such as John Stuart Mill, claim that a duty to prevent significant risks of loss to others when it requires lesser risks and duties to do so is rooted in the utilitarian principle because such action will result in the greatest good for the greatest number. *See* MILL, *supra* note 42, at 42-43. Kant finds such a duty in the categorical imperative. *See* KANT, *supra* note 42, at 39-57.

some benefit to other members of the public.[44] However, when the state seeks to give assistance to a person who refuses it, a conflict is created between these values. "Strong paternalism" is at issue when the state imposes its assistance against the will of a competent person whom it is seeking to benefit. Strong paternalism is justified on the grounds that the imposed assistance is necessary to the well-being of its subject, and that the furtherance of that well-being overrides his or her interests in autonomy. Ardent libertarians have rejected such justifications, however, holding that only harm to others or the public good justifies overriding autonomy that is competently exercised.[45] In contrast, "weak paternalism" entails protection only when one's reason is infirm or when temporary intervention is necessary to establish whether conduct is voluntary and autonomous or not.[46] This exercise of paternalism rests on the premise that providing for the well-being of others is morally required in circumstances in which their auton-

---

[44] "Beneficence" is used in this Article to mean the intention to "[bring] about good . . . in the lives of [other] persons for their sakes." A. Don Sorensen, *Freedom and Regulation in a Free Society*, *in* THE CONSTITUTION AND THE REGULATION OF SOCIETY 67, 70 (Gary C. Bryner & Dennis L. Thompson eds., 1988). Beneficence requires positive action to help others, rather than simply the noninfliction of harm. For the argument that beneficence includes a moral duty to assist others to prevent loss, see PETER SINGER, PRACTICAL ETHICS 168-71 (1979). Alternatively, some philosophers, such as Patrick Devlin, have argued that shared moral convictions constitute invisible bonds that are needed to hold orderly societies together. In this sense, state coercion requiring individuals to live good lives serves the public good as well as individual interests. *See* FEINBERG, *supra* note 2, at 39-40. Often, interests in autonomy and beneficence can be accommodated through a concept of social compact and bargained-for exchange; some freedoms are voluntarily relinquished to obtain certain social benefits. *See* LOCKE, *supra* note 42, at 269-72.

[45] *See generally* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 174-79 (2d ed. 1983); Gerald Dworkin, *Paternalism*, *in* MORALITY AND THE LAW 107 (Richard A. Wasserstrom ed., 1971). Examples of strong paternalism would be the criminal law's disallowing the defense of freely given consent by a homicide victim and the common law's refusal to enforce contracts by competent adults to sell themselves into slavery. Thus, to the extent that paternalism encompasses assistance and protection for persons capable of autonomous action, as well as those considered incapable of it, paternalism poses a moral dilemma because it includes a claim that, at least in some cases, beneficence should take precedence over autonomy. John Stuart Mill believed that the only justification for limitations on an individual's liberty was the prevention of harm to others. "His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute." MILL, *supra* note 42, at 96.

[46] *See* Joel Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 105-24 (1971). When assistance is imposed on objecting persons whose condition limits their ability to make autonomous choices, some theorists, like John Rawls, have justified paternalism on the ground that it provides the protection that rational autonomous persons would choose for themselves in situations where their rationality and competence is compromised. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 248-49 (1971) ("Thus the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society."); Dworkin, *supra* note 45, at 107.

omy interests are weak or nonexistent. Yet, it can be argued that such "weak paternalism" is not paternalism at all, exactly because it does not require a violation of clearly perceived autonomy interests. Thus, justifications for paternalistic action differ depending on the "weight" given to the autonomy interests involved.

Whether the representative payee program can be justified as weak paternalism depends on what credibility we give to the SSA's determinations about beneficiary "capability"—that is, their capacity for autonomous action.[47] Yet, we are caught in a circularity, for it is precisely the integrity, credibility, and legitimacy of those determinations about autonomy we need to assess.[48] That is, SSA procedures for determining capability are only defensible as weak paternalism if they are exercised when a beneficiary's autonomy is compromised, but one needs to apply the procedures in order to know if the beneficiary's autonomy is compromised. The difficulty is that the ability to engage in autonomous action is not a fact to be discovered, like blindness, but is, instead, a legal conclusion reached through the application of procedures for attaching significance to facts in order to accomplish a given objective. A person who, in fact, is unable to balance her checkbook or a person who is unable to make a purchase of food is not "capable" of autonomously directing the expenditure of her social se-

---

[47] Representative payment is strong paternalism if SSA determinations of incapability are viewed as "erroneous," so that indirect payment is imposed on persons whose autonomy is not weakened by infirmity. By the same token, representative payment is weak paternalism if SSA determinations of incapability are credited as "legitimate." If these determinations cannot be so credited, then representative payment necessarily amounts to strong paternalism and must be legitimated on some basis other than impaired autonomy, such as an intention to benefit the refusing competent adult or an intention to protect third parties or the public from harm.

[48] "Legitimate" is used in this Article to mean in compliance with principles of justice derived from the traditions of a liberal democratic republic. Thus, government action that complies with constitutional and statutory requirements can be considered lawful, in the sense that it complies with the formal criteria that identify the manner in which institutions exercise authority to make or declare the law. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 (1958). *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961). Nevertheless, such action can be regarded as illegitimate if it fails to conform to principles that transcend enacted rules. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 655-69 (1958); *see also* George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981). In a representative democracy such principles include principles of participation and representation which animate the Constitution and our political heritage. *Cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980). Where an agency such as the SSA promulgates standards and procedures in accordance with the constitutional standards and statutory requirements, its action is lawful in the positivistic sense. However, if such action is not the product of or accountable to a representative or participatory process for the formulation of social policy, it can be regarded as illegitimate. For a fuller discussion of the legitimacy of the SSA's representative payee program, see Margaret G. Farrell, *Doing Unto Others: A Proposal for Participatory Justice in Social Security's Representative Payment Program*, 53 U. PITT. L. REV. (forthcoming 1992).

curity benefits only if one attaches that significance to those facts, a significance that rests on a value judgment about minimally acceptable quality of life. Agency procedures for making incapability decisions determine whose judgment counts. Thus, the administrative process through which SSA determines capability shapes the substance of the legal concept of capability used to justify the exercise of that process. Since one cannot test the validity of capability determinations as though they were discoveries of empirical fact, one must assess the legitimacy of the procedures used to make such determinations. Establishing the legitimacy of procedures on a basis other than their ability to "accurately discover" incapability can break the circle.

Furthermore, even as weak paternalism, representative payment is not warranted simply because legitimate procedures establish impaired autonomy. Impaired autonomy is only a necessary, not a sufficient, condition for the exercise of weak paternalism. The overriding of even impaired autonomy is ultimately justified only if protection and assistance are actually provided. The SSA's suspension of the right of beneficiaries to control the expenditure of their benefits is morally defensible only if trustworthy assistance is provided through application of the agency's standards and procedures for selecting and monitoring payees. Thus, if the agency's procedures fail to assure reliable management assistance when the agency has determined it is needed,[49] the preference for beneficence over autonomy cannot justify SSA's program even conceived as an exercise in weak paternalism.

Two procedural models for making capability determinations and monitoring payees are considered below. Each claims to be legitimate because it is based on a value preference for either autonomy or beneficence, the values put in tension by paternalism. Thus, each claims to embody a principle or norm external to positive law and the procedure's capacity for accurate fact-finding, that renders it just. It is the agency's compliance with the models and accommodation of those values that needs to be explored. As this Article will demonstrate, in large measure the SSA's standards and procedures for making incapability determinations and for providing the assistance of a payee conform to neither model, and thus effectively accomplish neither objective—neither safeguarding autonomy nor providing beneficiaries the assistance they need.

---

[49] *See infra* notes 150-213 and accompanying text.

III. THE LEGAL MODEL AND INDIVIDUAL INTERESTS IN AUTONOMY

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."[50]

A. *State Guardianship*

State guardianship laws exemplify what can be called a legal model of procedural justice. It is a model premised on the proposition that the judicial, adjudicatory process is the best mechanism for finding facts, presenting reasoned argument, and applying law to facts. Also, the legal model privileges individual liberty and property interests.[51] There is vigorous debate about the ability of adversarial guardianship procedures to protect individual liberty and property interests in light of the functional limitations of the persons subjected to the procedures and their frequent inability to retain lawyers in order to avail themselves of the safeguards the procedures are to provide.[52] Nevertheless, if put into practice, requirements for notice and hearing, rigorous fact-finding, and allocation of the production and persuasion burdens on the party seeking to provide or impose protection and assistance tip the scales heavily toward the effectuation of autonomy interests.[53] Viewing representative payment in a historical context, one must question whether it should be reformed—like civil commitment and state guardianship before it—to reflect the legal justice model; or, whether other models, such as the older therapeutic model for the exercise of *parens patriae* powers, are appropriate to the purposes of representative payment.[54]

---

[50] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by* Berger v. New York, 388 U.S. 41 (1967).

[51] In addition to the promotion of more accurate factual determinations, formal guardianship procedures may serve other purposes, such as respect for the dignity of persons subjected to guardianships and public acknowledgement of the importance of individual property rights and liberty in our society.

[52] *See, e.g., Guardians of the Elderly: An Ailing System*, AP SPECIAL REP. (Associated Press), undated, at 11-13 (on file with the *Cardozo Law Review*) [hereinafter *Guardians of the Elderly*].

[53] However, procedures are not without their cost. The cost of some procedures may not be justified where more limited rights are at issue than those rights at stake in state guardianship proceedings. For due process purposes, the Supreme Court requires a weighing of the interests at stake, as well as the costs and benefits of procedures to enhance accuracy. *See infra* note 118.

[54] The state's *parens patriae* powers are derived from the Anglican concept that the king or sovereign, as the protector of the people, has authority and responsibility to protect the person and estate of minors, lunatics (one who has lost his senses), and idiots (one who lacks intelli-

In the 1960s and 1970s, advocates of mentally disabled people first challenged civil commitment laws and later challenged state guardianship laws using the legal rights analysis developed in civil rights and civil liberties litigation.[55] They asserted the rights of their clients to both liberty and treatment.[56] As a consequence of their efforts, commitment and guardianship laws have been reformed by courts and legislatures to conform to a legal model—one in which the adversarial judicial process assures accurate determinations and where the risk of error is allocated in favor of individual liberty inter-

---

gence and has never had his senses). *See* PREROGATIVA REGIS, 1324, 17 Edw. 2, chs. 9-10 (Eng.); 1 WILLIAM BLACKSTONE, COMMENTARIES *460 (Chitty 1841); SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW 464 (2d ed. 1968); John Parry, *Incompetency, Guardianship, and Restoration*, *in* THE MENTALLY DISABLED AND THE LAW 369 (Samuel J. Brakel et al. eds., 3d ed. 1985); *see also* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). *See generally* ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES (2d ed. 1949). Prior to the fourteenth century, guardianship, or tutorship, was a function of the lord of the manor, who protected both the person and the property of mentally deficient subjects largely to prevent the dissipation of assets to which heirs would become entitled and to prevent the subject from becoming a burden on the lord. *See* Parry, *supra*, at 369. Later, this authority was extended to mentally ill as well as mentally deficient subjects.

> The king's guardianship was exercised through the Lord Chancellor, by virtue of a special commission issued to him by the Crown rather than by the general authority of the chancery court. In exercising the power, the Chancellor held an inquisition to determine the condition of the mentally disabled person and to appoint a committee for his person and property if he was adjudged an "idiot" or a "lunatic." It was the further duty of the chancery court to supervise and control the conduct of such a committee.

Id. at 369. It was assumed under common law that the mental condition of such persons prevented them from making reasonable decisions and that they were proper subjects for the king's protection. By contrast, persons who were not so disabled mentally, were not protected—no matter how foolish and unreasonable their decisions. 1 WILLIAM BLACKSTONE, COMMENTARIES *306 (Chitty 1841) ("[W]hen a man on an inquest of idiocy hath been returned an unthrift and not an idiot, no farther proceedings have been had.") (emphasis and footnote omitted).

Today, the term "guardian" is most often used to refer to a guardian of the person, or a guardian of both the person and the estate of an incompetent. A guardian of the estate alone is often referred to as a "conservator." UNIF. PROB. CODE § 1-201(8), 8 U.L.A. 8 (West Supp. 1992). The term "guardian" is used in this Article to mean a court-appointed protector of the person and/or estate of an incompetent person. *See id.* § 1-201(20), 8 U.L.A. at 9.

55 RALPH REISNER & CHRISTOPHER SLOBOGIN, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 599-601 (2d ed. 1990). For a discussion of these efforts, see Stanley S. Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 STAN. L. REV. 553 (1979); Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975); Michael Kindred, *Guardianship and Limitations Upon Capacity*, *in* THE MENTALLY RETARDED CITIZEN AND THE LAW 62 (Michael Kindred et al. eds., 1976); Anna M. Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405 (1979).

56 *See* Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1316-33 (1974).

ests.[57] The breadth of the legal disability resulting from a finding of legal incompetence varies, of course, from state to state.[58] In the last several decades, an increasing number of states have passed "graded guardianship" laws which permit the granting of limited powers directly related to the functional impairment of the particular ward in question.[59] These efforts to attach different legal consequences to different individual functional abilities reflect a higher regard for autonomy than the older blanket approach to legal incompetence. Thus, present-day state guardianship can be viewed as a form of paternalism carried out through a legal justice model that seeks to safeguard individual liberty from intrusions by the state.[60]

Whether representative payment procedures should be reformed to conform to the legal justice model cannot be answered unless the purposes of representative payment are clarified through legislative or administrative process, for paternalism itself as a goal only poses the conflict. Some would argue that because the SSA's representative payment program as effectuated by the SSA seeks to assist mentally and physically impaired persons by controlling disposition of their fi-

---

[57] *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974). Most states now distinguish between incompetency and involuntary hospitalization, so that hospitalization alone is not sufficient to sustain a finding of incompetence. Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972). Today, there are guardianship laws in all fifty states which authorize the appointment of a guardian when an individual is determined to be mentally or physically incapacitated in accordance with trial type procedures and various definitions of incompetence. *See* Parry, *supra* note 54, at 395-433 tbls. 7.1-7.6. While there seems to be little reliable data on the number of state guardianships in effect at any one time, it has been estimated that they do not exceed 400,000 nationally—only about 8% of the number of persons for whom the SSA has appointed to serve as representative payees. *Guardians of the Elderly*, *supra* note 52, at 7. Most state guardianship statutes provide the proposed ward with extensive hearing rights, including the right to present written and oral testimony, cross-examine witnesses, and be represented by counsel. Jurisdiction over guardianship and conservatorship matters is allocated to probate courts; judicial review is provided to intermediate courts of appeal and the state supreme courts. In all but a few states, a legally incompetent person remains so until the ward or an interested person petitions for restoration of rights. California provides for automatic restoration of rights unless conservators apply for reappointment; other states require automatic periodic review of guardianships. Parry, *supra* note 54, at 393 & tbls. 7.3-7.4, 7.6. Advocacy efforts to secure treatment rights have produced mixed results.

[58] Parry, *supra* note 54, at 408-24 tbls. 7.3-7.4, 428-33 tbl. 7.6.

[59] *See* ABA COMM'N ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM 16 (1989).

[60] This concept derives from a regulatory model designed to reconcile competing claims of government authority—to further the public interest—with private autonomy interests in liberty and property. The model is intended to assure the accurate application of legislative directives to limit government interference with private action to those instances which have been willed by a representative legislature. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975). In the case of representative payment and governmental paternalism, the conflicting interests in autonomy and assistance are both private interests of the beneficiary; thus, a preference for private interests is not sufficient to support adoption of the legal model.

nancial resources, the program should be patterned on the legal justice model adopted by state guardianship laws to effectuate similar purposes. Yet, representative payment differs from and is less restrictive than the appointment of a guardian in several respects: the legal authority transferred to the payee is less comprehensive; the interests of heirs in preserving the incompetent's assets are not directly implicated; and the property affected is limited to certain government provided benefits. In many cases, however, the beneficiary interests at stake in representative payment are just as strong as those at stake in guardianship proceedings. When publicly provided benefits constitute the beneficiaries' only income, the authority to control those benefits gives payees control over almost all aspects of beneficiaries' lives, including where they will live and travel, what they will eat and wear, and what they can do for fun. As demonstrated below, neither Congress nor the SSA have clarified which purposes representative payment is meant to serve or what kinds of procedures are suitable to accomplish them.

B. *The Representative Payment Program and the Legal Model*

In several critical respects, SSA procedures fail to conform to the legal model underlying state guardianship. As mentioned, the procedures adopted by the SSA in making representative payment determinations are patterned on those devised to determine eligibility for monetary payments. These procedures fail to safeguard the individual interests at stake in representative payment for two important reasons. First, the SSA has failed to articulate a standard of incapability that would provide consistency in the determinations made by health care and SSA personnel and, therefore, has failed to give notice to beneficiaries of the kinds of conduct that may result in a determination of incapability.[61] Second, although those procedures provide beneficiaries with a number of postdetermination appeals, many are redundant and fail to afford beneficiaries a meaningful opportunity to participate in the decision about their capability *before* that decision is made.[62] In addition, unlike an eligibility determination, a determination that a beneficiary is unable to manage basic life decisions impugns dignity and self-respect, as well as autonomy and property interests. Thus, the opportunity to participate in determinations of incapability may be especially important to beneficiaries in the case of representative payment.

---

[61] *See generally* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 5-6 (1962).

[62] *See infra* notes 85-110 and accompanying text.

1. *The Standard of Need: The Need for a Standard*

The Social Security Act does not provide the Secretary of the Department of Health and Human Services with standards to guide the agency's determination to ensure that representative payment serves the "interests" of individual beneficiaries, and the Constitution does not require that the Act do so.[63] Nevertheless, the SSA has implemented its broad statutory authority by limiting its own discretion to those instances in which the SSA or some other designated decision maker determines that "due to a mental or physical condition or due to their youth," a beneficiary is "unable to manage" his or her own

---

63 The social security program itself has been found by the Supreme Court to be an exercise of congressional authority to spend public funds for the general welfare. *See* Helvering v. Davis, 301 U.S. 619, 640 (1937); Steward Machine Co. v. Davis, 301 U.S. 548, 581, 587 (1937). The authority to limit the legal rights of beneficiaries to direct payment can be regarded as "necessary and proper" to the exercise of Congress's spending powers. U.S. CONST. art. I, § 8, cl. 18. The standard chosen by the SSA for the exercise of its discretion must be accepted by reviewing courts as congressionally intended unless it is not authorized by Congress or arbitrary and capricious. *See* Sullivan v. Zebley, 493 U.S. 521, 528 (1990) (quoting Bowen v. Yuckert, 482 U.S. 137, 145 (1987) (quoting Heckler v. Campbell, 461 U.S. 458, 466 (1983))); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984); *see also* Batterton v. Francis, 432 U.S. 416, 426 (1977).

Although the nondelegation principle was used to strike down some regulatory legislation at the beginning of the New Deal period, the Supreme Court has not invalidated a federal statute because of an excessive delegation of legislative power to an executive agency since Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). *See generally* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982). Legislation will continue to be sustained so long as it lays down some "intelligible principle" to guide the exercise of delegated authority by the executive. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also* National Cable Tel. Ass'n v. United States, 415 U.S. 336 (1974); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.1 (2d ed. 1984). *But see* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting). The nondelegation principle's current significance is the support it provides for narrow constructions of legislative grants of administrative authority. *See* Lichter v. United States, 334 U.S. 742, 785 (1948); Yakus v. United States, 321 U.S. 414, 425 (1944). Some commentators find the demise of the nondelegation doctrine an unfortunate development that jeopardizes the legitimacy of administrative discretion. *See, e.g.*, J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972).

It is more likely that concerns about accountable decision making in the representative payment program would be found to offend due process prohibitions against vagueness and arbitrary agency action than the nondelegation doctrine. Thus, the argument can be made that the authority granted to the Secretary by Social Security Act §§ 205(j) and 1631(a)(2) to deprive social security beneficiaries of their legal right to control their benefits when it is in these beneficiaries' "interests" to do so, is too vague to preclude arbitrary agency action or to put beneficiaries on notice of the circumstances under which indirect payment might be ordered. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); *cf.* Boyce Motor Lines Inc. v. United States, 342 U.S. 337 (1952). *See also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1043-45 (1986). For a discussion of the constitutionality of the SSA's standards and procedures for representative payment, see Farrell, *supra* note 48.

benefits.[64] This two-part test may be intended to prevent the imposition of unwanted assistance on the grounds that the recipient uses his or her autonomy in an unusual or unapproved manner.[65] Yet, in practice, the SSA's standard of incapability permits monitoring of beneficiary behavior because evidence of one factor—failure to manage benefits at some minimally acceptable level—may be taken by a physician or claims representative to be evidence of the other factor—a mental or physical condition which is responsible for the failure. This latter factor defines incapability or inability to manage benefits as a lack of control or autonomy and establishes representative payment as an exercise of weak paternalism. It distinguishes such incapability from voluntary failure, refusal, or neglect to manage benefits appropriately, which requires the exercise of strong paternalism.[66] However, no separate tests or findings about mental or physical functioning are required by the SSA to establish the inability of the

---

[64] *See* 20 C.F.R. §§ 404.2001-.2065 (1992); 20 C.F.R. §§ 416.601-.665 (1992). Apart from regulations, the SSA has further articulated its policy with regard to withholding of control over entitlements in its Program Operating Manual System ("POMS"). *See* SSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM OPERATING MANUAL SYSTEM (1991) [hereinafter 1991 POMS]. The POMS consists of over thirty volumes of detailed instructions and is maintained in local social security offices, but is not otherwise easily accessible to the public. The manual is a compilation of detailed policy instructions and step-by-step procedures intended to guide SSA personnel in carrying out their responsibilities under the statute and regulations. Because the SSA considers its POMS to consist of interpretative rules and general statements of policy, and thus, to be exempt from Administrative Procedure Act rule-making requirements, the instructions concerning representative payment contained in the POMS are not promulgated after public notice and opportunity for comment is given. Nor is the POMS regarded by the agency as binding on administrative law judges or the SSA Appeals Council. *See* H.R. REP. NO. 618, 98th Cong., 2d Sess. 21-22 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038, 3058-59; H.R. CONF. REP. NO. 1039, 98th Cong., 2d Sess. 35 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038, 3093 (dealing with the Social Security Disability Benefits Reform Act of 1984).

[65] Under this two-part test, a payee should not be appointed when a person is unable to manage his or her benefits, if such inability is not due to a mental or physical impairment or youth (as might occur if a beneficiary were unable to manage benefits because they were improperly appropriated by family members). Nor should the SSA appoint a payee where the beneficiary has no mental or physical impairment, even if in the Secretary's opinion the appointment of a payee would be in the beneficiary's interest (as where a beneficiary who is able to manage benefits to secure basic food, shelter, and clothing instead uses the benefits for gambling and alcohol). Imposing representative payment in the latter case would require the SSA to become the monitor of the prudence of all benefit expenditures. *See* Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 603 (1981); *see also* W. VA. CODE § 27-11-1(d) (1986) (stating that neither poor judgment nor unusual lifestyle is competent evidence on which to base a finding of incompetency); Partello v. Holton, 44 N.W. 619 (Mich. 1890). The Uniform Probate Code requires both a finding of mental impairment and a resulting inability to manage affairs effectively, in order to ensure that guardianship is not applied as a broad form of legal paternalism. UNIF. PROB. CODE § 5-401, 8 U.L.A. 279 (West Supp. 1991). For a broad interpretation of this provision, see Frolik, *supra*, at 614-16.

[66] Frolik, *supra* note 65, at 603-04.

beneficiary to acquire and process information that results in unacceptable benefit management. The merged standard provides physicians and claims representatives with great latitude to find a beneficiary incapable solely because the beneficiary has used benefits for unapproved expenditures—such as gambling, drinking, and unpopular charities—whether such expenditures were the result of mental or physical impairments of autonomy.[67] Furthermore, even the first factor—an inability to manage benefits—is not defined by an articulated standard of a minimally acceptable life style, which, of course, is a value judgment.

Rather than promulgate a definition of "capacity to manage benefits" as a level of minimally acceptable functioning (such as the ability to secure food, shelter, clothing, and medical care) and require evidence of physical or mental disfunction, the SSA has chosen to rely on the application of a number of different standards utilized for a variety of reasons by persons and agencies other than the SSA. SSA determinations of incapability turn on the various state incompetency standards, the diverse opinions of physicians and health care personnel regarding ability to manage, the standards of other agencies such as the Department of Veterans' Affairs ("VA"), and the opinions of untrained local SSA personnel, regardless of whether the standards used by such entities were intended to further the same purposes as representative payment.

Thus, notwithstanding that the statute and regulations do not require it, SSA guidelines provide that representative payment will be made for all persons adjudicated legally incompetent under state law.[68] Although in general state guardianship procedures are grounded in libertarian principles protecting individual autonomy, state law standards for the imposition of a guardian or a conservator vary considerably.[69] Thus, by accepting the incompetency determinations of state courts as conclusive determinations of incapability, the SSA, in effect, adopts fifty different state standards of competence as sufficient conditions for the federal appointment of a payee.[70] In addition, state guardianship standards are used for purposes different than

---

67 In addition to mental or physical incapability, the agency must find that the beneficiary's interest would be served by payment to a representative. 20 C.F.R. § 404.2001(a) (1992).

68 1991 POMS, *supra* note 64, § GN 00502.010(A).

69 For example, some states permit such an appointment solely upon a finding of a mental status, such as lunacy, insanity, idiocy, mental retardation, and advanced age. *See generally* Parry, *supra* note 54, at 369-434.

70 *See* 1991 POMS, *supra* note 64, § GN 00502.010(A)(1)-(2). There is currently no significant "anti-delegation" principle which prevents Congress from delegating its authority to legislate under the Commerce Clause to state regulation.

the purposes for which payee determinations are to be made, such as the preservation of assets for the benefit of heirs.[71] Furthermore, the SSA has no assurance that state determinations of incompetence upon which it relies are made in accordance with due process as required by the Constitution, or in accordance with principles the agency believes should be applied as a matter of sound administrative policy.[72] Finally, there is much debate over whether the procedural safeguards required by state guardianship laws are, in fact, provided.[73] Thus, accepting state incompetency determinations as conclusive proof of incapacity to manage social security benefits is not tantamount to the adoption of a standard of incapacity devised to accomplish the purposes of federal representative payment.

Similarly, if incapability is not based on an adjudication of legal incompetence or minority, the SSA may make a decision to appoint a payee based on a physician's or psychologist's opinion regarding capability, if it is available.[74] However, physicians are not required to base

---

[71] Guardians may be appointed under state laws to preserve assets for the benefit of heirs, as well as to conserve income. A ward may be found incapable of managing complicated investments even though there is no finding that the ward is incapable of spending modest amounts of current income for food, shelter, and clothing. *See generallly* MARQUART POLICY ANALYSIS ASSOCS., CONSERVATORSHIP OF THE ELDERLY: RECOMMENDATIONS FOR ITS INTERFACE WITH PROGRAMS AND SERVICES FOR OLDER CALIFORNIANS (1988) (a report to the California Senate Subcommittee on Aging). However, since accumulated social security benefits become assets as well, this objective of guardianship may also support representative payment.

[72] Similarly, the SSA has a blanket policy of directly paying minors who are emancipated under state law, regardless of the actual relationship between the basis for emancipation and competence to handle social security benefits. Minors between the ages of 15 and 18 are assumed to be incapable of managing their benefits, but they are permitted to establish that they may nevertheless qualify for direct payment. *See* 1991 POMS, *supra* note 64, § GN 00502.070(A)(1)-(2).

[73] *See, e.g.*, H.R. 5266, 100th Cong., 2d Sess. (1988) (a bill to protect the rights of persons to due process of law and equal protection of the laws in guardianship proceedings introduced by Representative Pepper); *Guardians of the Elderly*, *supra* note 52, at 11-12. *See generally* Parry, *supra* note 54, at 380-85. A random sample study of over 2,000 guardianship proceedings in all 50 states disclosed that 49% of the proposed wards were not present at their hearings while only 8% waived their right to be present. *Guardians of the Elderly*, *supra* note 52, at 4. Also, while 34 states provide legal representation and 36 made a guardian *ad litem* available when needed, in only 3% of the cases sampled did the proposed ward have private counsel. Furthermore, 17% of the cases had attorneys appointed by the court, 31% had guardians *ad litem* appointed, and 44% had no representation at all. Jury trials are mandatory in only five states and permitted in 23 states. *Id.* at 6. Of the 13 states that specify the standard of proof to be applied in guardianship proceedings, only 9 require clear and convincing evidence and one requires proof beyond a reasonable doubt. *See* Parry, *supra* note 54, at 382. Similar observations are made with respect to civil commitment procedures. *Guardians of the Elderly*, *supra* note 52, at 7-8.

[74] *See* 1991 POMS, *supra* note 64, §§ GN 00502.020-.025. Medical evidence must be obtained whenever possible. Medical evidence is defined in the POMS to mean an opinion from a physician, psychologist, or medical officer as to the beneficiary's capacity—which indicates

their opinions on the results of any specified tests, evaluations, or investigations of facts not available from the beneficiary.[75] Thus, most physicians' opinions about beneficiary capacity have not been informed by evidence or testimony from other persons who observe the beneficiary in different surroundings, at different times, and under various circumstances. Nor are physicians told much about the meaning of the term "incapable" in the context of representative payee proceedings or the specific criteria upon which to base their opinion.[76] More fundamentally, although physicians are experts in determining the present and predicting future functional ability of persons with different mental and physical conditions, they are not experts in determining acceptable levels of functioning for general or specific purposes. The concept of acceptable levels of functioning is ultimately a value judgment not susceptible to expertise, medical or otherwise.[77]

When a state court adjudication of incompetence is not available, SSA claims representatives are required to determine on their own the capability of adult beneficiaries on the basis of statements made by beneficiaries, health care personnel, and lay persons.[78] SSA claims representatives in local SSA field offices are usually high school graduates and hold civil service journeyman grade level ratings. Despite the lack of a standard, claims representatives are instructed to determine capability by weighing all the evidence obtained, including evidence of the beneficiary's physical and mental health, living situation,

---

findings regarding the beneficiary's mental or physical condition. The opinion is based on an examination given within one year, and signed by the person conducting the examination, verifying that it is consistent with evidence in the file. *Id.* SSA claims representatives are to seek medical evidence, first, from the beneficiary's personal treating physician, or psychologist, or the medical officer of a medical facility in which the beneficiary is resident. It is not clear what determination is to be made where a beneficiary refuses or cannot afford to pay for a physician's capability determination. Presumably, the claims representative is authorized to collect lay evidence and base a determination upon it. *See id.* § GN 00502.030(A)(1).

75 SSA claims representatives are not to accept medical evaluations as a final determination of capability, but must consider nonprofessional evidence in all cases. *Id.* §§ GN 00502.020(B), GN 00502.030(A)(1). The agency's past reliance on the opinion of physicians may have resulted in overassessment of incapability. Prior to 1991, if in a physician's opinion a beneficiary was incapable, the SSA would accept the finding as convincing evidence and make a determination for representative payment. False positives thus resulted in payeeships. However, if the opinion was that the beneficiary was capable, a claims representative could still collect nonprofessional information upon which to base a determination of incapability. False negatives thus could not preclude payeeships. *Id.* § GN 00502.050(B).

76 Physicians are asked to complete a form that explains that the SSA appoints a representative payee because some beneficiaries are not capable of handling their funds to meet their "basic needs." SSA Form 787 (1990). *See also infra* note 80 (discussing function assessment standards).

77 *See* BEAUCHAMP & CHILDRESS, *supra* note 45, at 70-74.

78 *See* 1991 POMS, *supra* note 64, § GN 00502.030(A).

needs, money management skills, education, and work history.[79] Furthermore, although trained to collect information about state incompetency determinations and medical opinions, these civil service employees are not trained to gather and evaluate relevant empirical information about mental or physical functional capacity. Nevertheless, factual information about physical and mental functioning is essential to an informed exercise of their discretion. No effort has been made to systematize the gathering of information necessary to assess individual functioning.[80]

It may be argued that since the judgment about capability is not an expert diagnosis of an existing condition, but essentially a policy determination about whose behavior is acceptable and who shall receive certain assistance, it is quite appropriate that the capability decision be made by nonexpert line personnel in the agency. The opinions

---

[79] *See id.* §§ GN 00502.030(A), GN 00502.060(B). Thus, under certain circumstances, an incapability determination by a claims representative is a ministerial act, where one gathers conclusive evidence of incapability such as legal incompetence. However, there are other circumstances in which an incapability determination is a discretionary act based on the claims representative's gathering, and personal evaluation, of information about the individual beneficiary's mental and physical condition, needs, abilities, and life style.

[80] Understanding that different functional levels are necessary to cope with different situations, 40 states, at least, now provide for "limited guardianship" rather than all-or-nothing determinations of legal competence. LEGAL COUNSEL FOR THE ELDERLY, DECISION-MAKING, INCAPACITY, AND THE ELDERLY: A PROTECTIVE SERVICES PRACTICE MANUAL 76 n.93 (1987). Psychologists have published guidelines for the assessment of competency in adults for guardianship purposes. However, those assessments have only begun to take into account recently acquired information about neuropsychological and functional deficits among the elderly, who comprise the great majority of candidates for representative payment. *See* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 274 (1986); Arpiar G. Saunders, Jr. & Mitchell M. Simon, *Individual Functional Assessment: An Instruction Manual*, 2 MENTAL & PHYSICAL DISABILITY L. REP. 60 (1987). Researchers in gerontology, for instance, have described several distinct abilities associated with self-care and financial management, such as maintenance of biological functions and health, perception, cognition, and social function. They have constructed written instruments to assess individual ability to carry on simple and complex activities in each of those areas. *See* George T. Grossberg & George H. Zimny, Evaluating Competency for Guardianship of the Aged app. A (Mar. 26, 1985)(unpublished report submitted to the Center for Studies of the Mental Health of the Aging, National Institute of Mental Health, on file with the *Cardozo Law Review*). For example, these written assessment forms ask the beneficiary or the persons making the assessment to answer questions about daily living skills, such as:

VISION:

_____ See well ot [sic] read
_____ Need no glasses
_____ Read well with glasses
_____ Cannot read
_____ Cannot see well enough to read
_____ Someone must read for you
_____ Cannot read English
_____ Vision is [p]oor . . .
. . . .

of line personnel can be regarded as reflecting unarticulated community standards about acceptable life styles that should control capability determinations. But one might also be concerned with the lack of consistency in claims representatives' decisions that result from the lack of a standard of incapacity.

Perhaps the true test of capability is a beneficiary's ability to understand and navigate the agency's convoluted procedures for making a final determination of capability. Beneficiaries who are not able to respond effectively to "advance notices" and "formal notices," to seek reconsideration, to invoke a de novo hearing, to appeal, and to seek judicial review, prove themselves incapable of managing their affairs in the process. While this may be a cynical view, one is struck with the ponderous redundance of the agency's procedures which, despite their appearance of fairness, manage to deny beneficiaries the one opportunity we might assume we would all value in the situation—the

---

LIVES:

_____ In own home
_____ Live with someone
_____ Who
_____ Cares for spouse/relative
_____ Who
_____ Cared for by someone else[ ]
_____ Who
_____ Live in apartment alone
_____ Live in apartment with someone
. . . .
_____ Live in senior citizen apartment
_____ Live in nursing home
_____ Other (Specify) _____
. . . .

PHONE:

_____ Use phone independently
_____ Know a few well-known numbers
_____ Answer independently
_____ Answers independently, but has difficulty hearing or understanding.
_____ Don't use phone
_____ No phone . . .
. . . .

Id. app. A at A19-A21.

Other areas of questioning include hearing, speech, mobility, housekeeping, shopping, transportation, grooming, toileting, sleep, medication, mood, financial management, food preparation, eating, bathing, dressing, activities, family, and friends. Scores on such functional assessments are tabulated and used in conjunction with information about physical health, cognitive capacity, and the individual's environment to provide a basis for making a recommendation regarding guardianship. *Id.* at 26-28. SSA claims representatives could be required to administer questionnaires designed to assess beneficiary function and cognition and be trained to evaluate the results before deciding whether to impose representative payment.

opportunity to take part in the agency's determination that we are incapable, before it is made.

2. *Determination Procedures: The Test of Capability?*

The substance of a beneficiary's right to control the expenditure of social security benefits can be seen as shaped by the standards and procedures used to determine incapability.[81] In the case of representative payment, the procedures used by the SSA fall short of those used in other contexts to define liberty and property interests more generously. SSA procedures that shape the right to control benefits fall into three stages. First, the SSA gathers information relevant to the beneficiary's capability. Second, the SSA makes a determination of incapability, gives the beneficiary a postdetermination notice (called an "advance notice") and implements a confirmed determination. Finally, after implementation, a dissatisfied beneficiary has a right to reconsideration of the decision, a de novo hearing before an ALJ and a right to appeal an adverse ALJ's determination to the Social Security Appeals Council and the federal courts.

As the following examination reveals, at each stage in its proceedings, the SSA safeguards autonomy interests less effectively than state guardianship laws and the legal model of procedural justice would require. For example, at the first stage, in contrast to state guardianship laws, the SSA has no standing requirements.[82] That is, the SSA does not require that an investigation into capability be initiated only by a person with an interest in the person's welfare by virtue of family ties, custody, or financial relationship.[83] The Administrative

---

[81] Thus, the substance of the right to control benefits can be regarded as a statutory right to receive benefits, which Social Security Act §§ 205(j) and 1631(a)(2) make dependent on the Secretary's not finding the beneficiary "incapable"—a finding which is dependent on the procedures for the acceptance and weighing of evidence of incapability discussed herein. Although a majority of the Supreme Court has retained the substantive/procedural distinction for purposes of due process analysis, *see, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), the conceptual dependency of substance on process has been recognized by many judges and commentators. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (Rehnquist, J.) (persons provided substantive rights "inextricably intertwined" with procedural limitations "must take the bitter with the sweet"); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 73, 105, 166-67 (1985).

[82] *See* 1991 POMS, *supra* note 64, § GN 00502.020(A)(1).

[83] Most state guardianship statutes require that guardianship proceedings be initiated only by an "interested person." Forty-five states require that guardianship proceedings be initiated only by an "interested person," while the remaining five permit a friend or relative to make application for the appointment of a guardian. *See* Parry, *supra* note 54, at 393 & tbl. 7.6. In about 30 states, the proposed ward may initiate proceedings for the appointment of a guardian, while in about 12 jurisdictions, the state, including the court itself, may move for such an appointment. However, if the appointment of a payee is regarded as less restrictive than guardianship, with less potential for stigmatization, and results in less litigation expense, then a

Conference of the United States ("ACUS") has recently recommended that the SSA establish a threshold of evidence necessary before it begins an investigation into a beneficiary's competence, in order to create a presumption of capability that cannot be challenged except upon some evidentiary showing. This evidentiary requirement would enhance the protection of autonomy interests.[84]

At the second stage, SSA procedures define the beneficiary's right to control benefits narrowly by failing to provide the beneficiary with either notice before a determination of incapability is made or an invitation to discuss managerial needs face-to-face with an agency decision maker before payment is made to a payee. At this stage, the SSA provides "advance notice" to a beneficiary and initiating parties of the SSA's "proposed action."[85] The SSA, however, does not provide notice before the incapability determination is made, as state guardianship laws and the legal model would require. Instead, SSA guidelines, the Program Operations Manual System ("POMS"), provide that the notice is to be sent only *after* incapability has been established and a proposed representative payee has been chosen.[86] If a beneficiary lodges a valid protest with the SSA within ten days after

---

broader concept of standing may be appropriate and in keeping with general trends to broaden the concept of standing before administrative agencies.

[84] *See* 1 C.F.R. § 305.91-4 (1992). *See generally In re* Tierney, 421 A.2d 610, 615 (N.J. Super. Ct. 1980); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

[85] 20 C.F.R. § 404.2030(a) (1992) ("[W]e notify the beneficiary or the individual acting on his or her behalf, of our proposed actions. . . . [T]hat we plan to name a representative payee and who that payee will be."); *see also* 20 C.F.R. § 416.630 (1992); 1991 POMS, *supra* note 64, § GN 00502.400(A).

[86] 1991 POMS, *supra* note 64, § GN 00502.400(A)(1) provides that notice is sent "once incapability is established and a proposed representative payee has been selected." The notice informs the beneficiary that a decision to appoint a payee has been made and that the beneficiary has an opportunity to review the evidence upon which the decision was based and to submit additional evidence before the decision is implemented. *Id.* § GN 00502.400(A)(2). The determination that triggers the advance notice is regarded by the agency as an "initial determination," to which reconsideration procedures and appeal rights attach. The beneficiary can provide additional information to the agency before its incapability decision is implemented. *Id.* SSA regulations and the POMS are consistent only if the regulations are construed to mean that the beneficiary is notified of the proposed *implementation* of an incapability determination, not the proposed determination itself. Advance notice is sent to the beneficiary and each person being considered as representative payee.

In 1990, Congress addressed the notice and hearing issue in representative payment, but not effectively. As amended in 1990, the Social Security Act requires the SSA to provide the beneficiary with notice of the Secretary's initial determination to certify representative payment *before certification is made*, but to provide a hearing only to the same extent as provided in the case of determinations of entitlement to benefits. *See* 42 U.S.C. § 405(j)(2)(E)(i)-(ii) (Supp. II 1991). The Social Security Act requires that the notice shall be clearly written in language that is easily understandable to the reader, shall identify the person designated as payee, shall explain the right to appeal the determination of need for a payee (or the payee

receiving an advance notice, the determination will not be implemented and the beneficiary may submit additional evidence.[87]

These second stage procedures do not fully protect or safeguard beneficiary interests for several reasons. First, they fail to provide beneficiaries with adequate notice of the agency's reasons for having found them incapable of managing their affairs. Although the beneficiary must overcome this determination to prevent the appointment of a payee, the notice does not inform the beneficiary of the standards the SSA has used to determine whether he or she is capable of managing benefits. The notice simply states that the SSA has found that payment to a representative payee "would be best for you."[88] The indeterminacy of the "capability" standard makes it especially difficult for a beneficiary to know what evidence the agency might find relevant for its purposes and, hence, what evidence he or she might submit to dispute the conclusion already reached.[89] Unlike the SSA,

---

selected), and shall explain the right to review the evidence upon which the designation is based and to submit additional evidence. *Id.* § 405(j)(2)(E)(iii).

Neither the Social Security Act nor the Due Process Clause require, as *Mathews* itself held, a hearing in similar circumstances before certain determinations of entitlement are made. Mathews v. Eldridge, 424 U.S. 319 (1976). A postdetermination hearing on entitlement to a continuation of social security insurance payments satisfies due process, at least where the protesting beneficiary had an opportunity to submit written evidence before the termination of benefits, as is done by beneficiaries proposed for representative payment. *Id.* Thus, the 1990 statute does not require a hearing before a determination of incapability is made or implemented.

87 *See* 1991 POMS, *supra* note 64, § GN 00502.420. A protest may also be made by telephone, but must be followed by a written protest within 10 days to be effective. *Id.* § GN 00502.400(A)(2). Certain exceptions to these rules are made where the agency determines that sending the advance notice would serve no useful purpose. Thus, advance notice is not sent to minor children or to adult beneficiaries adjudicated legally incompetent. *Id.* § GN 00502.400(c).

88 The SSA's notice states in relevant part:

> We are writing to let you know that we plan to make —— the representative payee for ——. This means that —— would get —— Social Security checks each month and use this money for —— needs. The facts we have show that this would be best for ——. . . . If you think that we should pay —— checks to someone else, you should let us know right away. You have 10 days from the date of this letter to do this. . . . If you have any questions, you should call, write or visit any Social Security office.

Sample Notice of Planned Action, used by the Social Security Administration Office, Landover Mall, South Office Building, Landover, Md. 20785 (Dec. 15, 1990) (on file with the *Cardozo Law Review*).

89 Professor Mashaw describes the bewilderment of participants in administrative proceedings which lack clear standards, predictability, and rationality as follows:

> They know only that they seem to be involved in an important decision concerning their lives. But they have no idea what is relevant to the decision, who will make it, and, in the extreme case, what precisely the decision is about. Perhaps the only thing that becomes clear in such a process is that if and when a decision is made, the participants will not be given any understandable reasons for it.

almost all state guardianship laws expressly provide that proposed wards shall be given notice before an action affecting their rights is taken, including an adjudication of incompetence.[90] Second, even after receiving notice that an incapability determination has been made, the beneficiary is not offered an opportunity to meet personally with a decision maker to discuss the finding. While a protesting beneficiary may submit written evidence to the claims representative,[91] there is no requirement that the beneficiary be offered an opportunity for a face-to-face interview, oral hearing, or meeting with the claims representative at which the need for assistance can be discussed, witnesses can be heard, and their stories scrutinized.[92] However, it is unrealistic to expect beneficiaries for whom indirect payment is proposed and who are old, ill, disabled, or otherwise impaired, and often uneducated, to express in writing their concerns about losing the legal control over their benefits. Again, state guardianship laws provide proposed wards with an opportunity for an oral judicial hearing before a determination of incompetency is made. Beneficiaries' autonomy interests in controlling their benefits are ill-served by the SSA's paper procedures. If the incapability determination is confirmed by the claims representative after protest, it is regarded by the agency as an "initial determination" and will be implemented immediately unless the beneficiary

---

MASHAW, *supra* note 81, at 175.

ACUS has recommended that the SSA notify beneficiaries when proceedings have been initiated to determine their capability to manage benefits, before determination has been made. 1 C.F.R. § 305.91-3(2)(a) (1992).

[90] *See* Parry, *supra* note 54, at 393 & tbl. 7.3. Only three states, Alabama, Louisiana, and Mississippi, fail to expressly require notice to the proposed ward. However, state law varies as to who must be served with the notice and how they must be served. Forty-eight states require that the proposed ward be directly informed of the place, time, and kind of proceeding that has been scheduled. *Id.*

[91] A valid protest must be filed in writing within the time allotted (usually 10 days) and indicate the reasons why the beneficiary believes direct payment should be made. The legally competent beneficiary, the guardian of a legally incompetent beneficiary or a legal representative, and other persons may review the evidence in the file if the manager of the field office determines that it is appropriate. 1991 POMS, *supra* note 64, § GN 00502.420(B)(5). A beneficiary determined incapable of managing benefits is permitted to examine the record upon which the determination is made unless there is reason to believe disclosure would pose a serious hazard to the beneficiary or some other person who provided information. *Id.* It has been the agency's policy in the past to order direct payment where a competent adult beneficiary objected to the appointment of a representative payee and was denied the opportunity to review sensitive evidence supporting the appointment. 3 SOCIAL SECURITY LAW & PRACTICE § 32:19 (Timothy E. Travers et al. eds., 1987).

[92] ACUS has recommended that beneficiaries whose capabilities have been questioned be offered a face-to-face interview with an SSA representative. 1 C.F.R. § 305.91-3(2)(a)(iv) (1992).

seeks reconsideration.[93]

At the third stage, three more postdetermination reviews of the agency's finding of incapability may be invoked—making five in all.[94] These additional reviews, however, also fail to provide the procedural safeguards of the legal model, which provides for an oral, adversarial, and evidentiary hearing. Furthermore, the decisions of the SSA's appeal board are not treated by the agency as precedent. Therefore, they do not provide a mechanism for formulating agency policy with regard to the standard of competence applicable to representative payment through adjudication.[95] Clearly, without a standard, there is no basis for a determination on competence made in the hearing.

The third stage begins when a written "final notice" of certification of indirect payment is provided to the beneficiary, all parties with rights of appeal, and other persons affected by the determination.[96] A beneficiary who is dissatisfied with the reconsideration by a claims representative may appeal within sixty days to an ALJ within the agency,[97] though few beneficiaries seem to do

---

93 1991 POMS, *supra* note 64, § GN 00502.420(B)(3). *See also* 20 C.F.R. §§ 404.902(o), 416.1402(d) (1992).

94 These three consist of "reconsideration," an ALJ hearing, and review by the SSA Appeals Council. The claims representative's determination to pay a representative, which itself confirms the earlier decision that a payee is needed, is considered a determination, for which "reconsideration" by a new claims representative may be sought. 1991 POMS, *supra* note 64, § GN 00502.420(B)(3). *See also* 20 C.F.R. §§ 404.203(b), 404.907, 416.1407 (1992). New evidence may be, but seldom is, submitted at this stage, and it is unusual for a beneficiary to appear in person to submit information upon a reconsideration review. Interview with Sheila Brown, Branch Manager, Social Security Field Office, in Landover, Md. (Dec. 15, 1989). While reconsideration occurs, benefits are paid to the payee. Reconsideration of an initial determination to appoint a payee is provided in accordance with the general rules governing appeals from other kinds of social security determinations, such as disability determinations. 20 C.F.R. §§ 404.203(b), 404.907, 416.1407 (1992). *See also id.* § 404.903(c) (1992) (in connection with Title II benefits); *id.* § 416.1404(c) (1992) (in connection with Title XVI benefits).

95 *See infra* notes 107-10 and accompanying text.

96 1991 POMS, *supra* note 64, § GN 00502.430. The selection of a particular payee, and also the need for a payee, are appealable by a competent adult beneficiary or the guardian of an incompetent adult beneficiary, and, therefore, are subject to advance and formal notice requirements. 20 C.F.R. § 404.906(d) (1992). However, a determination not to appoint a payee applicant is not appealable by the proposed payee. 1991 POMS, *supra* note 64, § GN 00502.410(B). The formal notice is sent to the beneficiary, the representative payee appointed, unsuccessful payee applicants, and the attorney or legal representative (such as a guardian or conservator) of the beneficiary. *Id.* § GN 00502.430. The notice informs the addressee of the action taken by the agency and the way in which the addressee may pursue an appeal within the agency.

97 42 U.S.C. § 405(b)(1) (1988); *id.* § 1383(c)(1)(A) (Supp. II 1991); *see also* 20 C.F.R. §§ 404.929-.965, 416.1429-.1465 (1992). There are about 700 ALJs conducting SSA hearings in 132 offices around the country. Koch & Koplow, *supra* note 15, at 222. ALJs are paid at the GS-15 level and may be removed only for good cause, in order to ensure their decisional independence and objectivity. Administrative Procedure Act ("APA") standards and procedural requirements, 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. II 1991), are not required by

so.[98] The ALJ appeal provides the objecting beneficiary with a de novo hearing,[99] but one which lacks the attributes of a judicial proceeding, such as a state guardianship proceeding which defined liberty and property interests more broadly. For example, although the allocation of the persuasion burden—the burden of proving capability—can be critical to the safeguarding of liberty interests, until very recently neither the Social Security Act nor SSA regulations expressly stated whether the persuasion burden was on the agency, on the party who proposes the representative payment, or on the beneficiary. SSA regulations and the POMS now allocate the risk of error to the agency and those proposing representative payment.[100] Thus, the risk of error is allocated in favor of false negatives and autonomy even though that means that some people who are incapable will not get assistance. The regulations do not specify what standard of proof must be met

---

statute to be applied in SSA proceedings, but have been incorporated into most SSA practices. *See* 1 CFR 305.91-2 (1992); Koch & Koplow, *supra* note 15, at 224-26; *see also* COFER, *supra* note 15, at 66-70.

98 Telephone Interview with William Taylor, Executive Director, Social Security Administration Appeals Council (Dec. 13, 1989).

99 *See generally* JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978). The ALJ is not bound by the claims representative's determinations, even if they are not arbitrary and are supported by substantial evidence. Rather, the ALJ reviews the written record, accepts additional evidence, written or oral, and makes a new determination of the issue. Though oral testimony is given under oath, witnesses are not formally cross-examined, written evidence need not be verified, and the rules of evidence are not applied. Furthermore, the ALJ acts not as an impassive judge, but as both inquirer—questioning witnesses to elicit information—and adjudicator. Usually the proceedings, which may last about an hour, are tape recorded to provide a record for appeal. While it is easier for unrepresented beneficiaries to participate in these informal proceedings, they dispense with adversarial procedures designed to eliminate some risks of error.

100 1991 POMS, *supra* note 64, § GN 00502.020(A)(1) provides that: "[A]n adult beneficiary is presumed to be capable of managing or directing the management of benefits[, unless the SSA has] information that the beneficiary may have a mental or physical impairment which prevents him/her from managing or directing the management of [his/her] benefits." *Id.* This provision is consistent with SSA regulations which provide as follows: "Our policy is that every beneficiary has the right to manage his or her own benefits." 20 C.F.R. § 404.2001(b) (1992). Implicit in this statement would seem to be the assumption that every beneficiary is presumed capable of managing his or her benefits. The presumption of capability is further borne out by the POMS provision that a Special Determination Form 553 must be prepared in those instances in which "[c]apability is established only because there is no convincing legal, medical, or lay evidence of either capability or incapability or there are contradictions which cannot be resolved." SSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM OPERATING MANUAL SYSTEM § GN 00502.060 (A)(2) (1989) [hereinafter 1989 POMS]. *See also* 1991 POMS, *supra* note 64, § GN 00502.020(A). This provision suggests, but does not clearly state, that where the evidence is balanced or conflicting, the burden of proving incapability has not been sustained. Finally, the SSA's actual practice seems to be premised on an assumption of capability. Interview with Sheila Brown, *supra* note 94.

before the fact finder may make a finding of incapability.[101] The Social Security Act provides that the need for representative payment must be supported by "adequate" proof,[102] but this term is not defined in SSA regulations.[103] The application of the due process test applied in *Addington v. Texas*,[104] a civil commitment case, suggests that due process may require a standard of proof higher than "adequate proof" in the case of representative payment. Indirect payment does not deprive beneficiaries of as much autonomy as civil commitment. However, the public's interest in assisting beneficiaries is not as weighty as its interest in protecting the public against dangerous mentally ill individuals proposed for commitment.[105]

Although very few payee disputes seem to be appealed beyond the ALJ stage, a disappointed beneficiary may appeal an adverse ALJ's determination of incapability or the selection of an unwanted payee to the SSA Appeals Council.[106] The Appeals Council's deci-

---

101 While standards of proof are difficult to articulate, they establish the degree of belief in the mind of the fact finder concerning a fact that is required by law for its proof.

102 42 U.S.C. §§ 405(j)(2)(A), 1383(a)(2)(B)(i) (Supp. II 1991).

103 The regulations and POMS indicate the kind of information the agency will consider in determining whether the beneficiary's interest will be served by representative payment, but not how much evidence of incapability will be sufficient to support a determination that representative payment is needed. 20 C.F.R. §§ 404.2010, 404.2015 (1992). Claims representatives are instructed only to "weigh all the evidence" before determining "whether the beneficiary's best interests would be served with representative payment . . . ." 1991 POMS, *supra* note 64, § GN 00502.060(B)(1).

104 Addington v. Texas, 441 U.S. 418 (1979).

105 In *Addington*, the Supreme Court held that where the state, in the exercise of its *parens patriae* powers, seeks to involuntarily commit a person to a mental hospital for treatment, it must establish the applicability of the statutory standard for commitment by clear and convincing evidence. *Id.* at 425-33. In judicial fora, the three most common standards of proof are "preponderance of the evidence" (the lowest standard), "clear and convincing evidence" (the intermediate standard), and "proof beyond a reasonable doubt" (the highest standard). The latter standard is applied in criminal cases, while the lowest standard is applied in most civil suits between private litigants. The intermediate standard is used in some cases in which the state acts in a civil capacity in such a way as to deprive citizens of important rights. The Supreme Court in *Addington* used a balancing test in which the individual's interest in avoiding the deprivation of liberty and stigma associated with commitment must be weighed against the state's interest in caring for citizens unable to care for themselves and in protecting society from dangerous mentally ill persons. The Court rejected the plaintiff's contention that proof beyond a reasonable doubt was required to justify the massive invasion of privacy involved in commitment and held that the risk of error must be shared by the parties. Application of the *Addington* balancing test to the adjudication of the right to control Social Security entitlements would seem to require a similar result. While the interest of beneficiaries in controlling their Social Security benefits may not be as great as the liberty interest of individuals in preventing physical confinement in an institution, society's interest in representative payment is also weaker than its interest in confining dangerous mentally ill persons. Ultimately, the answer to this procedural question, like the others, is dependent upon the values assigned to an individual's right to determine his or her own welfare and society's right to assist dependent citizens.

106 The SSA Appeals Council is a 20-member body created by SSA regulation, *see* 20

sions are subject to judicial review. However, the SSA Appeals Council decisions are not considered precedent by the agency.[107] Therefore, the Council's final decisions cannot formulate through adjudication the capability standard that the agency has failed to provide through rule making. Nevertheless, a decision of the Council constitutes a final determination by the agency, permitting the beneficiary to seek judicial review in the federal district court of the district in which he or she resides.[108] Unfortunately, the ability of federal courts to determine the legal requirements applicable in SSA representative payee cases depends, in part, on the agency's "nonacquiescence" policy. Nonacquiescence is the selective refusal of an administrative agency to conform its actions to the rulings of circuit courts of appeals until the ruling has been passed upon by the Supreme Court.[109] The SSA's current policy seems to be to acquiesce

---

C.F.R. §§ 404.967-.982, 416.1467-.1482, 422.205 (1992), which reviews certain agency determinations, *see id.* §§ 404.970, 416.1470. The Council's review is discretionary; it screens requests for review and grants full consideration to only a portion of the requests. Koch & Koplow, *supra* note 15, at 243. The Council has established various criteria for accepting disability cases, but it is not known what criteria are used in representative payee cases. Telephone Interview with William Taylor, *supra* note 98.

Like other SSA decision makers, the Council copes with an enormous caseload. It is estimated that each member is assigned about 500 cases a month and typically spends about 10 to 15 minutes per case to review the record and make a decision. Altogether, the Council may dispose of as many as 50,000 cases a year. Koch & Koplow, *supra* note 15, at 257. In contrast, state guardianship laws generally give jurisdiction over guardianship and conservatorship matters to probate courts, and provide for judicial review in intermediate courts of appeal and the state supreme court.

107 The Office of Hearings and Appeals publishes The OHA Law Reporter, which contains some ALJ and Council decisions. However, the Office makes clear that decisions published in The OHA Law Reporter are not to be considered as authority which can be cited. *See* OFFICE OF HEARINGS AND APPEALS, SSA, DEP'T OF HEALTH & HUMAN SERVS., THE OHA LAW REPORTER (1989). The OHA Law Reporter also publishes selected federal court cases, SSA Rulings (which are regarded by the agency as binding on agency decision makers), Federal Register material, and Appeals Council minutes.

108 *See* 42 U.S.C. § 405(g), (h) (1988). Where the beneficiary raises a facial challenge to the constitutionality of a provision, exhaustion of administrative remedies does not apply, and the appeal may be brought directly to court, without an appeal to the SSA Appeals Council. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989); SCHWARTZ, *supra* note 63, § 8.37, at 518. The *Briggs* court found that the plaintiffs had presented their claims to the Secretary and that the Secretary's action in suspending benefits where no payee could be found would cause irreparable injury since administrative appeal would be futile. Therefore, the court held that these conditions constituted a waiver of the requirement that administrative procedures be exhausted and provided the jurisdictional predicate for judicial review in compliance with the conditions of 42 U.S.C. § 405(g) (1988).

109 *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989). As applied before 1985, the SSA's nonacquiescence policy provided that the SSA would implement an adverse decision of a federal court only in the case that precipitated the order, but would not apply it prospectively to other cases even in the same federal circuit, and would issue a ruling to that effect. *Id.* at 692-99. *See generally* Koch & Koplow, *supra* note 15. This policy has been criticized by many commentators and

in most cases involving interpretation of the Social Security Act.[110] If this policy is continued, it would permit the federal courts to play some part in the formation of policy and procedures bounding the representative payee program.

Finally, the right to a hearing and appeal is a hollow one if it does not include the opportunity to have the assistance of counsel when needed.[111] Although social security beneficiaries have a right to be represented by legal counsel or laymen in representative payee determinations, they are not informed by the SSA of that fact;[112] they are not advised as to how they might obtain the assistance of a lawyer or nonlawyer representative,[113] and they do not have a right to such assistance at the agency's expense.[114]

---

members of Congress as unnecessary for the development of uniform national policy since the agency could seek Supreme Court review of statutory and constitutional decisions with which it disagreed. *See* Estreicher & Revesz, *supra*, at 681 n.8. Further, the SSA's nonacquiescence policy has been viewed as burdensome to beneficiaries who were thus required to relitigate the same issues in the same circuit. *See* H.R. REP. No. 618, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038, 3038; Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989); David Lauter, *Disability-Benefit Cases Flood Courts*, NAT'L L.J., Oct. 17, 1983, at 1.

110 In 1985, the SSA changed its policy. Reserving the right to appeal circuit court decisions and to relitigate the same issue in other circuits, the agency now publishes the decisions in which the agency will "acquiesce" in future cases brought in that circuit. Social Security Acquiescence Ruling, 20 C.F.R. § 422 (1992); Interim Circular No. 185 (for inclusion in OHA HANDBOOK (June 3, 1985)). While the listing of cases indicates when the agency will acquiesce, it leaves unpublished the list of cases in which the agency will not acquiesce. For a greater description of the SSA's nonacquiescence policy and its subsequent history, see Estreicher & Revesz, *supra* note 109, at 694-704.

111 *See generally* Zona Fairbanks Hostetler, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, 2 ADMIN. L.J. 85 (1988); COFER, *supra* note 15, at 11-12. The APA permits each agency to determine whether and under what conditions nonlawyers will be permitted to practice before the agency. *See* 5 U.S.C. § 555(b) (1988); 42 U.S.C. § 406(a) (Supp. II 1991). *But cf.* Coyle v. Gardner, 298 F. Supp. 609 (D. Haw. 1969); 20 C.F.R. § 404.1700 (1992).

112 The fact that no benefit awards are available out of which to pay for representation in representative payee cases may help explain why few beneficiaries seem to be represented by counsel. Nevertheless, the SSA could do more to promote lay and professional representation of beneficiaries in disputes over representative payment. ACUS has recommended that the SSA and other agencies take further action to clarify the entitlement of nonlawyers to fees and to protect them from prosecution under state unauthorized practice laws. Administrative Conference Recommendation No. 86-1 Nonlawyer Assistance and Representation, 1 C.F.R. § 305.86-1 (1992); Hostetler, *supra* note 111, at 85.

113 Advance notices of representative payee actions neither advise beneficiaries of their right to retain counsel or assistance from nonlawyers nor provide a list of sources from which such assistance might be obtained free of charge. 4 SOCIAL SECURITY LAW & PRACTICE, *supra* note 91, § 46:5. The agency's practice is not to otherwise provide that information unless requested by the beneficiary.

114 *See* Ware v. Schweiker, 651 F.2d 408, 413 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); Toledo v. Secretary of Health, Educ. & Welfare, 435 F.2d 1297, 1297 (1st Cir. 1971).

Although little information is gathered by the SSA about hearings held on representative payee issues,[115] the opinion of agency personnel is that very few determinations of the need for a payee are protested, appealed, or reversed by the agency.[116] This may reflect a general satisfaction with the results of SSA procedures which provide an informal, relatively speedy mechanism for resolving sensitive personal issues before a decision maker whose judgment reflects common sense and community values. It may also indicate that individuals proposed for indirect payment—those who have not been adjudicated incompetent, but are physically infirm, psychologically vulnerable, often poor, and almost never represented by legal counsel—cannot participate effectively in the complicated adjudicatory procedures established by the agency for determining the need for and selecting a payee.

In summary, it should be clear from this comparison of SSA procedures and those utilized in state guardianship proceedings that the SSA has not adopted a legal model of procedural justice for the certification of representation payment. On the one hand, the deprivation of rights resulting from representative payment may be viewed as less comprehensive than that resulting from guardianship, so it can be argued that fewer safeguards are merited. In addition, procedures themselves can become burdensome for those whom they are intended to protect, as in guardianship, where adult children must testify in open court about the incompetencies of their aging parents, and proposed wards bear the expense of the proceedings. On the other hand, the fewer the safeguards protecting liberty interests, the more likely it is that indirect payment will be imposed in the interest of beneficence. Furthermore, as discussed in part IV of this Article, the SSA is not in a position to provide the services necessary to assure that persons determined to be incapable will actually be assisted. Finally, SSA procedures preclude the formulation of agency policy through adjudication. This failure, coupled with the agency's failure to promulgate standards through rule making, provides beneficiaries with no guidance in ordering their private affairs and affords little consistency in agency actions. Although SSA procedures seem to meet the due process requirements set forth in *Mathews v. Eldridge*,[117] the unpredictability

---

ACUS has recommended that the agency inform beneficiaries of their right to be assisted by legal or lay advisors and to provide information about how such assistance can be obtained. 1 C.F.R. § 305.91-4 (1992).

115 *See generally* Koch & Koplow, *supra* note 15, at 224 n.139.

116 Interview with Fred Graf, *supra* note 17; Telephone Interview with William Taylor, *supra* note 98.

117 Mathews v. Eldridge, 424 U.S. 319 (1976).

they permit seriously inhibits the exercise of beneficiary autonomy.[118]

---

[118] Whether SSA procedures meet due process requirements articulated in *Mathews*, 424 U.S. at 335, depends upon whether a beneficiary's interest in controlling the expenditure of social security benefits is a constitutionally protected liberty or property interest. Mere expectations are not protected and may be affected by state action arbitrarily and without a hearing. *See, e.g.*, Leis v. Flynt, 439 U.S. 438, 442 (1979). Nor is due process required whenever personal interests are affected by government action. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773 (1980). Rather, the Constitution requires such process only where certain property or liberty interests found by the Supreme Court to be constitutionally protected are involved. *E.g.*, Vitek v. Jones, 445 U.S. 480 (1980); Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 677 (2d ed. 1988); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146 (1983); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977). Social security entitlements have been recognized as property protected by due process. Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970). In *Mathews*, the Supreme Court stated that the process that is constitutionally due can be determined by weighing the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

In *Mathews*, the Supreme Court held that an individual's interest in continued benefits under Title II of the Social Security Act was not of sufficient weight to merit the cost to the government of providing predetermination evidentiary hearings on demand before such disability insurance benefits were terminated.

Federal courts entertaining due process challenges to the procedures used in the representative payee program have reached, without much analysis, the additional conclusion that a beneficiary's interest in controlling his or her benefits is an interest entitled to due process protection. *See, e.g.*, Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989); McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); Jordan v. Schweiker, No. 79-994-W, slip op. at 9 (W.D. Okla. Mar. 17, 1983) (order granting summary judgment); Tidwell v. Weinberger, 1976 Unempl. Ins. Rep. (CCH) ¶ 14,756 (N.D. Ill. June 23, 1976). These courts' applications of the *Mathews* balancing test, *Mathews*, 424 U.S. at 335, would seem to require an implicit recognition that the interest at stake is sufficient to require a determination of the process constitutionally required. Whether beneficiaries have a constitutionally cognizable interest in simply the *unimplemented* determination by the SSA that they are "incapable" of managing social security benefits is more problematic. Without such an interest there can be no claim that due process requires notice and a hearing *prior* to an incapability determination being made.

However, even applying the *Mathews* test to the interest of social security beneficiaries in receiving direct payment of their benefits, several federal courts have found that the decreased likelihood of error that predetermination notice and hearings would afford was outweighed by the expense and inconvenience to the government of providing them. Tidwell v. Schweiker, 677 F.2d 560, 564 (7th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983); McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); Jordan v. Schweiker, No. 79-994-W, slip op. at 13 (W.D. Okla. Mar. 17, 1983). For a greater discussion of the application of *Mathews*'s due process requirements to representative payment procedures, see Farrell, *supra* note 48.

IV. THE THERAPEUTIC MODEL AND INTERESTS IN SOCIAL BENEVOLENCE

> It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. . . .[119]

A. *The Department of Veterans Affairs' Fiduciary Program*

A different model of procedural justice—although based on legislative authority almost identical to that given the SSA—can be seen in the fiduciary program established by the Department of Veterans Affairs ("VA") (formerly the Veterans Administration).[120] The procedures adopted by the VA to implement its authority to impose managerial assistance on veteran beneficiaries have many features in common with older exercises of *parens patriae* powers and can be called a "therapeutic model" of procedural justice.[121] The therapeutic model used to implement policies of weak paternalism reflects a preference for social beneficence over individual autonomy and is characterized by several features.[122] First, it proceeds on the assumption that diminished ability to make rational decisions and the need for assistance are objective facts which experts can discover. Accuracy, then, depends on expertise rather than on procedures for the application of agency judgment to empirical evidence. Second, the model is based on the conviction that remedial relief is possible in the form of treatment, care, or protection, and, furthermore, that it can be provided on an individual basis. Third, the state's provision of such remediation and assistance is regarded as essential and is the moral justification for the state's exercise of paternalism. Finally, the model is premised on the Rawlsian notion that impaired people, if they could choose rationally, would thank the paternalistic state for imposing

---

119 Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

120 *See* 38 U.S.C. § 3202 (1988); *cf.* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 309 (1985) ("[The] process prescribed by Congress for obtaining [VA] disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country.").

121 State interventions in private affairs justified as necessary for an individual's own good are considered exercises of *parens patriae* powers, while such interventions to protect third parties or the public are considered exercises of state police powers. *See* REISNER & SLOBOGIN, *supra* note 55, at 612.

122 Although the therapeutic model is premised on community values rather than individual liberty interests, the VA's implementation of the model in other contexts has been hailed by some commentators as more effective in respecting and protecting individual interests in self-esteem and dignity than the legal model. MASHAW, *supra* note 81, at 264-67.

assistance upon them.[123]

Historically, state *parens patriae* powers were likened to the role of benevolent parents who cared for vulnerable and dependent children and were concerned less with protecting child-like dependents from their parent-like benefactors than with the provision of needed protection and assistance.[124] Thus, *parens patriae* powers exercised through guardianship and civil commitment laws provided a model of justice that relied heavily on remedial justifications and professional expertise to assure that the best interests of the proposed ward were served.[125] For example, prior to the 1970s many states permitted commitment to a mental institution upon the certification by psychiatrists that the person to be committed was mentally ill and in need of treatment.[126] Consent of the person committed was not required, and no showing of dangerousness or threat to the community was needed; only proof, evidenced by the testimony of two or more physicians that the person needed treatment, was required.[127] Thus, doctors were invested with gatekeeping authority because of their special diagnostic expertise, their ability to discover the presence of disease or disability as an objective fact.[128] Persons in need of psychiatric treatment were confined to hospitals for the purpose of rehabilitation, not to jails for the purpose of deterrence or punishment. Therefore, it was contended that procedures appropriate in the criminal process to safeguard liberty were not necessary. Often procedural requirements such as notice, a strict standard of proof, and judicial review were lacking in commitment proceedings. Such procedural protection of

---

123 *See supra* note 46 and accompanying text. John Rawls has sought to construct a theory of justice by creating a conceptual mechanism for discovering community norms and values. Rawls engages in a hypothetical exercise in which abstracted individuals in the "original position" (behind a veil of ignorance about their position in society, their physical attributes, and their talents) rationally decide what social rules should bind them. RAWLS, *supra* note 46, at 11-13, 248-49; *see also* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 508-10 (1988) (book review); Gary Minda, *Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 644-45 (1989). Thus, in keeping with justifications for weak paternalism, the argument would be that if persons in the original position—not knowing whether they would be mentally or physically unable to manage their financial affairs—were to choose rules to govern themselves in such conditions, they would choose to be assisted, even against their will.

124 FEINBERG, *supra* note 2, at 45-46.

125 Just as children do not require protection from benevolent parents, neither were the objects of governmental paternalism thought to require protection from the state. David J. Rothman, *The State as Parent: Social Policy in the Progressive Era*, *in* DOING GOOD: THE LIMITS OF BENEVOLENCE 67, 70 (Willard Gaylin et al. eds., 1978).

126 REISNER & SLOBOGIN, *supra* note 55, at 599.

127 *Id.*

128 In many states, guardianship proceedings still depend heavily on psychiatric evaluations. Annina M. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 CLEARINGHOUSE REV. 451, 454 (1978).

the interests of the committee was regarded as unnecessary because the best interests of the person to be committed were effectuated through the commitment action, not through protection of his or her autonomy. These laws express a legislative determination that discharging social responsibilities to provide needed care and assistance are of greater importance than protecting personal liberty. A government that imposes assistance and protection upon persons who do not consent to it has been termed a "therapeutic state."[129] The VA's fiduciary program is one of only a few examples of the "therapeutic state" on the federal level.

If the merit of contemporary state guardianship is its safeguarding individual autonomy, the virtue of the VA fiduciary system is its creation of a bureaucratic structure for carrying out its beneficent mission. Unlike either contemporary state guardianship or the SSA program, the VA program is a social service program. VA personnel affirmatively seek to assist beneficiaries needing help, discuss their problems face-to-face, conduct medical and functional evaluations of their condition, provide individualized management services designed to foster assisted independence, and effectively monitor the performance of payees, called "fiduciaries."

In fulfilling these functions, the VA fiduciary system conforms to the therapeutic model in several important respects. First, for the VA, incapability or "incompetency" is an empirical fact to be discovered by specially trained experts, not a determination to be made by nonprofessional "field examiners" (such as SSA claims representatives who may make competency determinations) or by ALJs.[130] Instead, if a veteran beneficiary is not under legal guardianship and a VA field examiner determines that the appointment of a fiduciary may be necessary, the examiner must seek a state-appointed guardian through VA legal counsel or seek a VA rating of incompetence from the VA's

---

129 The "therapeutic state" differs from the "welfare state" in that the latter makes assistance (such as disability benefits) available only on a voluntary basis. KITTRIE, *supra* note 41, at 41.

130 38 C.F.R. § 3.103(c) (1991). The standard of incompetency applied by the VA Rating Board is generally stated in regulations to be a lack of capacity to contract or manage financial affairs due to an injury or disease. 38 C.F.R. § 3.353(d) (1991). Most VA field offices or stations contain a fiduciary and field examination unit within the Veterans Services Division ("VSD"). The unit is primarily responsible for the administration of the fiduciary program at the client level. *See* 38 C.F.R. §§ 13.2, 13.55 (1991); VETERANS SERVS. DIV. OPERATIONS, VETERANS ADMIN., DEPARTMENT OF VETERANS BENEFITS MANUAL M27-1, pt. 3 (Field Section), § 1, at ch. 2 ¶ 2.05 & ch. 5 (Aug. 15, 1975) (as amended Oct. 23, 1981) [hereinafter VA MANUAL]; Letter from Thomas K. Turnage, Administrator, The Veterans Administration, to Honorable Don Bonker, Chairman, Subcommittee on Housing and Consumer Interests, House of Representatives, Washington, D.C. (Oct. 8, 1988) (on file with the *Cardozo Law Review*) [hereinafter Letter from Turnage].

Adjudication Division.[131] By and large, incompetency determinations are made by the VA's expert Adjudication Division Rating Boards, which contain at least one physician member.[132] The Board may order that the beneficiary be examined by VA psychiatrists who must perform specified evaluations and submit their findings to the Board.[133] Beneficiaries may request a hearing before the Board, but such hearings do not have the attributes of a judicial hearing. Rather they are nonadversarial, informal meetings in which the board members take an active exploratory role in developing evidence.

Second, in its fiduciary program, the VA seeks to rehabilitate the beneficiary in order, wherever possible, to restore direct payment. The VA sees its fiduciary oversight function as one of tailoring the amount of assistance in each case to the individual needs of the beneficiary. Unlike the SSA, the VA itself will supervise and assist beneficiaries in handling their own funds in certain situations. VA field examiners make periodic personal visits to beneficiaries who are under "supervised direct payment" or who have appointed fiduciaries. In addition, VA estate analysts take an active role in monitoring the way in which the veteran's total income and assets, including non-VA funds, are handled by a VA fiduciary or guardian.[134] Thus, the VA has more flexible payment options available to meet the individual needs of its beneficiaries as those needs have been expertly defined.[135]

Third, the VA will act as supervisor of direct payment to incompetent beneficiaries and actively monitor the activities of fiduciaries

---

131 VA field examiners are instructed to inform the VSD in the state that the agency seeks appointment of a fiduciary and the VSD will then determine whether a "rating action" is necessary. A "rating action" is a determination by a VA Rating Board, part of the Adjudication Division, as to whether a beneficiary is competent. The Adjudication Division may request that the VSD order a field examination if one has not been conducted. VA MANUAL, *supra* note 130, ch. 2 ¶ 2.05(a).

132 The VA will also accept determinations made by a state court. 38 C.F.R. § 13.55 (1991). If the beneficiary being investigated is under a legal guardianship, the field office may either appoint the guardian as the VA fiduciary or select someone else. Although the Supremacy Clause of the Constitution permits the VA to appoint a fiduciary other than the guardian to handle VA benefits, most often, the field examiner will certify the guardian as the VA fiduciary.

133 Telephone interview with Jack Thompson, Assistant General Counsel, Department of Veterans' Affairs (Jan. 3, 1990).

134 The VA estate analysts are responsible for maintaining and auditing accounts received from fiduciaries, including determining the appropriateness and legality of investments. VA MANUAL, *supra* note 130, ch. 8 ¶ 8.19; *see also* DEP'T OF VETERANS BENEFITS, VETERANS ADMIN., ESTATE ANALYST PROGRAM GUIDE PG 27-2, ch. 4 ¶ 4.05 (Sept. 10, 1981). Analysts may order fiduciaries to provide surety bonds for the faithful performance of their duties, upon consideration of listed factors relevant to the likelihood of misfeasance. VA MANUAL, *supra* note 130, ch. 8 ¶ 8.23. On occasion, the analyst may work with the fiduciary and/or a court with jurisdiction over guardian-fiduciaries to resolve discrepancies or raise potential objections.

135 *See* VA MANUAL, *supra* note 130, ch. 2 ¶ 2.05(b); *see also* 38 C.F.R. § 13.56 (1991).

that it appoints to assure that the intended assistance is provided. Thus, after the appointment of a fiduciary, the field examiner may require an accounting at any time for the protection of the beneficiary's interest[136] as part of, or in addition to, an accounting to the state court.[137] When problems arise between the beneficiary and fiduciary, the field examiner will mediate the dispute, but may also order repayment of funds or remove the fiduciary. VA estate analysts sometimes become so involved with particular cases that they act as surrogate fiduciaries, approving expenditures and budgets. Field examiners can become similarly involved with beneficiaries whose funds are paid directly but under the supervision of the field office.

Finally, for most of its history, decisions of the Board of Veterans' Appeals were not subject to judicial review.[138] This is consistent with the therapeutic model's reliance on scientific expertise to effectuate social interests in providing assistance rather than a reliance on legal procedures to safeguard libertarian interests. However, since the Veterans' Judicial Review Act of 1988,[139] a finding of incompetency by the VA's highest administrative adjudicatory body may be reviewed by the Court of Appeals for the Federal Circuit, which has authority to overturn decisions which are clearly contrary to law.[140] The scope of judicial review currently provided in the court of appeals for the federal circuit is unclear.[141]

Thus, although the Secretary of HHS and the VA Administrator have similar statutory authority to appoint representative payees, the two agencies have used their authority differently.[142] The present VA

---

136 38 C.F.R. § 13.100(a)(2) (1991).

137 38 C.F.R. § 13.59(a) (1991). Telephone Interviews with William Salisky, Acting Assistant Director of Program Management, Department of Veterans' Affairs (Sept. 9, 1989 & Sept. 21, 1989).

138 Reconsiderations of Rating Board determinations are conducted by the field office and referred back to the Rating Board if the beneficiary submits new evidence or indicates errors of fact or law in the initial determination that warrant consideration by the Board. *See* VA MANUAL, *supra* note 130, ¶ 27.02(a).

If reconsideration is denied, the beneficiary is notified and given an explanation of the reasons for the denial. *Id.* ¶ 27.04. A denial of reconsideration can be appealed to a hearing examiner for de novo review with an appeal to the Board of Veterans Appeals. 38 C.F.R. § 3.103 (1991).

139 Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. §§ 4051-4092 (1988)).

140 *See id.* at 4120 (codified at 38 U.S.C. § 4092 (1988 & Supp. I 1990). However, a candidate for appointment as fiduciary may not appeal his or her nonappointment or removal. Sena v. Roudebush, 442 F. Supp. 153 (D.N.M. 1977).

141 Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 ADMIN. L. REV. 365, 380-83 (1989).

142 38 U.S.C. § 3202(a)(1) (1988) provides in part:

Where it appears to the Administrator that the interest of the beneficiary would be

Administrator has acknowledged that there are social purposes served by representative payment apart from the interests of individual beneficiaries; that is, the prevention of fraud, waste, and abuse of public funds paid to VA beneficiaries.[143] In addition, the VA has devised procedures that protect the public's interest in providing funds and managerial assistance to veterans by assuring and monitoring payee services. It is true that the VA's fiduciary program serves a much smaller beneficiary population than the SSA's representative payee program.[144] Perhaps this significantly smaller caseload has permitted the VA to take a more assertive role in identifying beneficiaries who need protection and supervising the use of benefits on their behalf. In addition, the VA may charge the estate of the beneficiary for the costs of providing a fiduciary and the costs of participating in court proceedings adjudicating the adequacy of the fiduciary's performance,[145] something Congress has only recently permitted on a limited basis in the social security program.[146] The ability to provide payment for payee services makes it easier for the VA to find suitable fiduciaries for veterans than it is for the SSA to find payees to serve without

---

> served thereby, payment of benefits under any law administered by the Veterans' Administration may be made directly to the beneficiary or to a relative or some other person for the use and benefit of the beneficiary, regardless of any legal disability on the part of the beneficiary.

Id. Regulations promulgated pursuant to the authority are found at 38 C.F.R. §§ 13.1-13.111, 14.500-14.709 (1991).

143 *See* Letter from Turnage, *supra* note 130.

144 In contrast with the SSA, which makes more than $20 billion in representative payments to more than 10% of all social security beneficiaries or almost 5 million persons, the VA supervised, in the year ending in June 1987, the payment of some $1.03 billion in benefits (7.2% of total VA pension and compensation benefits) to 124,350 incompetent or legally disabled adult beneficiaries. Veterans Admin., Fiduciary Program Briefing 4-6 (Nov. 9, 1987) (unpublished report presented to the Administrator of Veterans Affairs, on file with the *Cardozo Law Review*) [hereinafter Fiduciary Program]. This number does not include some 3,000 institutionalized beneficiaries who do not receive direct payment or the 5,000 to 6,000 children who receive representative payment over which the Administration retains no supervisory function. Telephone Interview with William Salisky, Acting Assistant Director of Program Management, Department of Veterans' Affairs (Sept. 9, 1989).

Not surprisingly, the VA's fiduciary program is more costly per capita than the SSA representative payee program. In 1987, the program cost the VA about $14.3 million to operate, or about $115.32 per beneficiary annually. Fiduciary Program, *supra*, at 5. Completely comparable figures for the SSA are not available but total SSA cost per beneficiary in representative payment is clearly much lower than that incurred by the VA. The SSA has indicated the cost of monitoring payees alone is about $2.17 per beneficiary annually. Jordan v. Schweiker, No. 79-994-W, slip op. at 16 (W.D. Okla. March 17, 1983). Defenders of the VA's more benevolent approach to the fiduciary program note that the program recovered about $7.3 million in misused funds and *prevented* the misuse and irresponsible expenditure of millions more. Fiduciary Program, *supra*, at 5-6.

145 *See* 38 U.S.C. § 3202 (1988).

146 42 U.S.C. § 405(j)(4)(A)-(C) (Supp. II 1991).

payment.[147]

To the extent that Congress has not provided for the payment of comprehensive payee services either out of individual social security benefits or through appropriations to the SSA, it may be argued that Congress is more responsive to the needs of veterans of the armed forces than to the needs of social security beneficiaries, many of whom are disfunctional.[148] Veterans are people to whom the nation owes a debt for services important to the country's very existence, while social security beneficiaries are people who have earned social security insurance through work or are welfare recipients who have become dependent on the state for subsistence. So characterized, the VA fiduciary program may reflect an unstated assumption that social beneficence will be given greater priority where its beneficiaries are deserving objects of gratitude than where they are simply infirm or dependent human beings. Such a premise would suggest that social assistance is provided as part of a contract-like exchange for national service rather than provided unilaterally as an act of kindness intended to benefit only the recipient.

B. *The Representative Payment Program and the Therapeutic Model*

The SSA has not adopted a therapeutic model of procedural justice to assure the provision of needed managerial assistance. Many of its incapability determinations turn on the nonexpert judgments of state courts (which may or may not be informed by medical evidence), lay claims representatives, and ALJs. In addition, the assistance the SSA offers beneficiaries is not tailored to their particular needs nor intended to restore their ability to handle their own benefits. But, perhaps the best illustration of the agency's failure to embrace the therapeutic model is the way in which the SSA selects and monitors payees. At the same time that the SSA provides essentially duplicative, after-the-fact procedures to safeguard individual autonomy in determinations, the agency is unable to assure the provision of appropriate payee services. As a result, the interests of vulnerable beneficiaries in both self-determination and the receipt of needed

147 The absence of such authority in the Social Security Act could arguably indicate that Congress neither intends that Secretary take such an active role in finding and assisting social security beneficiaries nor that he or she utilize state guardianship adjudications and accounting procedures. More likely it indicates only an implicit recognition of the fact that social security insurance and welfare benefits provide only bare maintenance to recipients and that the deduction of administrative costs for representative payee services could work a hardship for some beneficiaries.

148 *See supra* notes 18-19.

assistance are inadequately served. The SSA's reluctance to investigate and monitor payees, its failure to provide payees or serve as payee itself for vulnerable beneficiaries without family and other assets, its suspension of benefits altogether in those situations, and its failure to provide either beneficiaries or payees an appeal of misuse determinations—all result in a program in which liberty interests are restricted for benevolent purposes which the agency is not in a position to accomplish. The SSA's institutional uncertainty about the priority of the values put in conflict by the concept of paternalism not only inhibits its ability to effectuate either goal, but undermines the justifications for its action.[149]

1. *Investigation and Selection of Payees*[150]

SSA procedures do not conform to the therapeutic model because they fail in several ways to assure the actual provision of needed assistance. First, historically, the SSA has not assured effective payee services by carefully investigating the trustworthiness of persons the agency appoints to handle the funds of incapable beneficiaries.[151] Only after Congress first required such investigations and then set out specific investigatory procedures did the agency accept the responsibility to find trustworthy payees.[152] Prior to amendment of the Social Security Act in 1984, the SSA did not request on its application form

---

149 *See supra* notes 40-47 and accompanying text.

150 The determination of incapability and the selection of a payee often occur simultaneously. The appointment of a representative payee is usually initiated when a friend or relative of a beneficiary files an SSA-11BK form describing his or her relationship to the beneficiary and stating why it would be in the beneficiary's interest that the applicant be appointed representative payee. 1991 POMS, *supra* note 64, § GN 00502.160(A). In keeping with statutory instructions, the SSA now requires a face-to-face interview with prospective payees whenever possible. *Id.* § GN 00502.163(A).

151 In 1979, a federal court held that because the SSA had discretion with regard to the selection of a payee, it had no obligation to investigate or verify information provided to it by applicant payees. Watson v. Califano, 487 F. Supp. 179 (S.D.N.Y. 1979), *aff'd sub nom.* Watson v. Harris, 622 F.2d 577 (2d Cir. 1980).

152 *See* 42 U.S.C. §§ 405(j)(2), 1383(a)(2)(B) (Supp. II 1991). Although in 1984 Congress did not spell out the *kind* of payee investigations that the agency would be required to undertake to determine the qualifications of a payee, a federal district court in 1989 held that even in the absence of regulations, the statute by implication required that, at a minimum, such investigation must include a face-to-face interview with the proposed payee and background questioning. Holt v. Bowen, 712 F. Supp. 813, 818 (D. Colo. 1989). The *Holt* court then found that the SSA had been negligent in its failure to investigate the payee, who had an extensive criminal record, after it found that he had provided a false address and false job references. In that case, the payee's prior criminal record, which included check fraud and robbery, was easily accessible from local law enforcement agencies. Yet, the agency did not ask the applicant about his criminal record and made no attempt to determine it independently. The court held that the SSA was under an obligation to investigate a representative payee before retroactive, lump sum benefits were released. *Id.* at 815-18.

information about the applicant's criminal convictions or past performance as a payee.[153] After receiving testimony about the appointment of persons with easily discoverable criminal records, Congress, in the 1990 amendments to the Act (OBRA), set forth particular steps the agency must take to investigate individual payee applicants, including a face-to-face interview where possible.[154] Not only did the SSA undertake to investigate payees only after Congress and the courts required it, the agency also made little effort to verify or generate information about payees necessary to check their past performance as payees.[155] Now Congress has required the agency to maintain data banks containing relevant information about payees.[156] In addition, the Act prohibits the appointment of certain persons and organizations, including those who have been convicted of social security fraud, those who have been removed as a representative payees in the past, or those who are creditors of the beneficiaries (with certain exceptions).[157] If the agency had weighed its benevolent purpose heav-

---

153 As late as 1989, a northern California legal services attorney testified before Congress as follows:

> [O]ur clients, out of desperation, have brought known alcoholics living on the streets into a Social Security office and had those persons approved as payees on the spot, without even the semblance of an investigation. Social service personnel report to us that Social Security personnel will approve anyone who walks in the door as a payee with no questions asked.

Hearing, *supra* note 1, at 87 (testimony of Curtis L. Child before the United States Senate Special Committee on Aging).

154 42 U.S.C. §§ 405(j)(2), 1383(a)(2)(B) (Supp. II 1991).

155 For example, even though the SSA's practice of simply asking the proposed payee whether he or she has ever been convicted of a felony is plainly an unreliable means of determining prior criminal records, the SSA ordinarily does not make an independent inquiry about criminal convictions. The SSA has not even kept payee information generated by the agency itself, such as whether a person who applies to be appointed payee has served as payee in the past, has been suspended or terminated, has been convicted of social security fraud, or is a payee for other beneficiaries at the current time. In addition to requiring the agency to obtain documented proof of such information, OBRA requires the SSA to establish a computerized information system that will make such data available by social security number. 42 U.S.C. §§ 405(j)(2)(B)(ii) (Supp. II 1991). These steps, again undertaken only at the insistence of Congress, should be valuable in protecting beneficiaries from exploitation by unscrupulous persons. Nevertheless, this kind of micromanagement of the agency by Congress is time-consuming, expensive and often ineffective because circumstances within which the program must function change constantly.

156 The amendments require documented proof of identity, a social security number, and a determination whether the applicant has been found guilty of social security fraud or previous misuse of beneficiary funds. 42 U.S.C. §§ 405(j)(2)(B), 1383(a)(2)(B)(ii) (Supp. II 1991).

157 20 C.F.R. § 404.2020 (1992). The factors the claims representatives are to consider include the relationship between the parties, any legal authority the potential payee might possess to act on behalf of the beneficiary, the amount of interest that the potential payee shows in the beneficiary, whether the potential payee has custody of the beneficiary, and whether the potential payee is in a position to know of and look after the needs of the beneficiary. *Id.* *See also* 1991 POMS, *supra* note 64, § GN 00502.110(B). Classes of potential payees are listed in

ily, it would have instituted such procedures without congressional compulsion.

Second, the SSA does not provide the payee assistance that capable beneficiaries themselves believe they need.[158] Thus, the SSA will not appoint a representative payee for a competent adult who requests one. However, it will directly deposit benefits to the beneficiary's bank account, which can then be accessed by a trustee or person with power of attorney. Nor has the agency consulted beneficiaries about the payees to be selected, despite the fact that beneficiaries may know best who can fulfill their needs for managerial assistance.[159] Further-

---

preferential order by the SSA to guide claims representatives in their selection. *Id.* § GN 00502.105(D). The list pertaining to child beneficiaries contains seven classes of potential appointees. These classes are based on appointees' relationship to the children, whether they are supporting the children, and whether they have demonstrated concern for the children. 20 C.F.R. §§ 404.2021(b), 416.621 (1992); *see also* 1991 POMS, *supra* note 64, §§ GN 00502.105(C), GN 00502.110(B). Legal guardians will be appointed only if they will serve the interests of the beneficiary better than a family member or other interested person. *Id.* § GN 00502.130(B)(1).

Conflict of interest problems arise where a beneficiary, incapable of handling benefits, resides in a hospital, mental institution, nursing home, or board-and-care home. In such cases, the facility may be appointed payee only if there are not other suitable payees and the facility is licensed or meets other criteria. The SSA has cautioned claims representatives about the problem, but does not prohibit the appointment of such institutions or facilities when it would serve the beneficiary's interest. *Id.* §§ GN 00502.136, GN 00502.105. Statutory guardians, such as institutions that are authorized by legislation to act as guardians for persons in their custody but are not required to account for their stewardship, are not given the same standing as legal guardians individually appointed by and accountable to a court. Institutionalized beneficiaries may have representative payees other than the superintendent of the institution. *Id.* § GN 00502.135. In fact, claims representatives are cautioned to consider the fact that in many cases, a custodial institution will be the primary creditor of a resident beneficiary, and conflicts of interest may occur between the institution's fiduciary duties as representative payee to act in the beneficiary's best interests and its financial self-interest as prime creditor. *Id.* Some states have included in the institutional licensing laws governing nursing homes and/or board-and-care homes prohibitions against such institutions acting as a representative payee because of potential conflict of interest problems. *See id.* § GN 00502.136(C). In the case of board-and-care homes, the SSA requires claims representatives to check the lists maintained by states pursuant to § 1616(e) of the Social Security Act, 42 U.S.C. § 1382e(e)(1988), of all such homes that fail to comply with state licensure requirements. 1991 POMS, *supra* note 64, § GN 00502.136. Board-and-care homes are defined as non-Medicare/Medicaid residential facilities which provide room and board and continuous protective oversight. If a facility complies with state licensing requirements, it may be appointed representative payee when it would be in the best interests of the beneficiary. A noncomplying home may be designated as representative payee only when all other potential candidates are unsuitable or not available, direct payment is prohibited or not in the beneficiary's best interest, a face-to-face interview with the beneficiary has been conducted, and appointment is not prohibited under state law. *Id.*

158 *Cf.* 1991 POMS, *supra* note 64, § GN 00502.020; *see also* 1989 POMS, *supra* note 100, § GN 00502.040(B)(4) ("An RP [(representative payee)] should never be appointed solely for the convenience of a capable beneficiary.").

159 Although now required by statute to personally interview the applicant payee to the extent practicable (pursuant to 42 U.S.C. §§ 405(j)(2)(A)(i), 1383(a)(2)(B)(i)(I) (Supp. II 1991)), the SSA has indicated only recently that the beneficiary whose funds will be controlled

more, although beneficiaries (but not would-be payees) are provided a right to contest the selection of a particular person as payee, they may do so only through the same redundant procedures available to contest a finding of incapability, discussed above.[160]

Finally, courts have found that the interests of applicant payees are not entitled to due process protection.[161] The payee's interest in representative payment is regarded not as a personal interest in his or her own liberty or property, but rather as derivative of the state's interest in providing needed assistance. The therapeutic model is premised on the effectuation of this interest.

2. *Suspension of Benefits in Absence of Payee*

Clearly, the most vivid illustration of the SSA's failure to embrace its benevolent mission is the SSA's past practice, now restricted by Congress, of suspending the payment of benefits altogether when beneficiaries are found to be in need of a payee and no suitable payee can be found. In an effort to provide assistance to dependent or vulnerable persons, the SSA would make a determination that these persons could not handle their own benefits. Then, if the incapable beneficiary was unable to find a suitable payee, the agency provided

---

by the payee might also be contacted regarding the selection of a payee. 1991 POMS, *supra* note 64, § GN 00502.100(B).

160 *See* 20 C.F.R. § 404.902(o)-(p) (1992). Determinations denying a request to be made a representative payee are not considered by the SSA to be an initial determination which entitles the applicant to seek reconsideration, an ALJ hearing, or an appeal. 20 C.F.R. § 404.903(c) (1992); *see also* 1991 POMS, *supra* note 64, § GN 00502.410(B). A rejected payee, such as a legal guardian, who has appeal rights as the representative of the beneficiary, may appeal the selection of the payee, but not his or her own nonselection. 20 C.F.R. § 404.902(o)-(p) (1992). These notice and hearing rights accorded beneficiaries have passed constitutional muster in at least one federal district court. *See* Fulk v. Moritz, 460 U.S. 1075 (1983). The district court in *Fulk* had agreed with the court in *Tidwell* that the notice and postdetermination procedural safeguards comported with due process requirements. *See* Fulk v. Moritz, No. C74-230 (N.D. Ohio Sept. 28, 1981).

161 In an analogous situation, it has been held that a wife certified as representative payee for her husband's veteran's benefits did not have a due process right to be informed of a change in payee or a hearing on the question. Citing Board of Regents v. Roth, 408 U.S. 564 (1972), the court in *Sena* held that the wife's expectation of continued receipt of her husband's benefits used for her support was not a property interest protected by due process. Sena v. Roudebush, 442 F. Supp. 153, 154 (D.N.M. 1977). The wife conceded that she had no protectable interest in her status as representative payee for the benefits used for her husband's support. *Id.* The *Sena* court interpreted McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977), as holding that the interest in controlling benefits is not an interest protected by due process. *Sena*, 442 F. Supp. at 153. The *McGrath* decision can also be read to hold only that the protected interest does not require a predetermination notice and an evidentiary hearing for protection. *Id.*

no benefits at all, leaving some beneficiaries destitute.[162] Until recently, this suspension of benefits was completely unauthorized by the statute.[163] However, in 1990, Congress amended the Social Security Act to permit the suspension of benefits for up to one month in most cases, but only when the agency determines that "substantial harm" will result from direct payment.[164] Before this recent authorization, it was the SSA's practice to suspend benefits altogether for up to ninety days and even longer in some circumstances.[165] Now the POMS provides that benefits may be suspended for thirty days where a claims representative finds that direct payment would cause physical or mental injury.[166] However, claims representatives would seem to be authorized to rely on their own judgments in making such findings of likely injury. Even under the new legislation, however, payment may be suspended for *more* than thirty days and until a new payee can be found in the case of minors, legally incompetent beneficiaries, or disabled SSI beneficiaries who have been found to be drug addicts or alcoholics.[167]

Presently, the SSA does not afford beneficiaries either notice of a proposed suspension of benefits or an opportunity to be heard before payments are withheld.[168] Unlike incapability determinations, the determination to suspend benefits is *implemented* before the beneficiary is notified of the determination. Although suspensions are subject to

---

162 *See Representative Payee Hearings*, *supra* note 7, at 8-11 (statement of Honorable Robert T. Matsui).

163 Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989).

164 42 U.S.C. §§ 405(j)(2)(D)(ii)(I), 1383(a)(2)(B)(viii)(I) (Supp. II 1991).

165 SSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM OPERATING MANUAL SYSTEM §§ GN 00504.100, GN 00504.200, GN 00504.205 (1986) [hereinafter 1986 POMS]. POMS § GN 00504.100 provides that ordinarily benefits will not be deferred or suspended more than 90 days unless the beneficiary is legally incompetent, is under age 15, or the recipient of SSI benefits as a drug addict and/or alcoholic ("DA/A"). *Id.* In these three instances, benefits will be withheld until a representative payee can be appointed. The 90-day limitation on such suspensions resulted from the settlement of a lawsuit brought to test the validity of the SSA's suspension policy which was approved by a federal district court in 1982. *See* Langson v. Regan, No. 76C-1668 (N.D. Ill. June 8, 1982), *cited in Briggs*, 886 F.2d at 1144. This limitation has not always been respected in practice. *See, e.g.*, *Briggs*, 886 F.2d at 1132.

166 *See* 1991 POMS, *supra* note 64, § GN 00504.100(A)(2)(a).

167 42 U.S.C. § 1382(e)(3)(A)(1988); *see also* 1991 POMS, *supra* note 64, §§ GN 00502.010(A), GN 00504.100(A)(2)(b). ACUS recently recommended that the SSA study the effects of indefinite suspension of benefits and make its findings known to Congress. 1 C.F.R. 305.91-9 (1992).

168 After payments are stopped, beneficiaries are sent a notice by the SSA informing them that "[w]e have suspended your benefits because we have not been able to find a suitable representative payee for you." 1991 POMS, *supra* note 64, § GN 00504.220(D). The beneficiary may appeal the suspension through the administrative appeals process. *See* 1991 POMS, *supra* note 64, § GN 00504.220(C)(3).

the formal appeals process,[169] it is unlikely that a full appeal could be prosecuted within the period during which payments may be suspended in most cases.[170] In the case of minors, incompetents, and substance abusers, whose benefits may be suspended indefinitely, appeal rights may be more meaningful.

The deprivation of the use of entitlements by the agency, without any notice or opportunity to be heard, raises serious due process issues.[171] Furthermore, the practice of suspending benefits pending identification of a suitable payee not only fails to assure remediation and needed assistance, but often has a devastating effect on beneficiaries. In *Briggs v. Sullivan*,[172] the United States Court of Appeals for the Ninth Circuit described the consequences of suspending benefits:

> The record before us, as the one before the district court, includes an extensive collection of affidavits from the appellants themselves, from individuals who operate soup kitchens and homeless shelters, from employees of social service agencies and church groups who seek to assist would-be benefits claimants, and from a dozen employees of Social Security field offices. These affidavits etch a grim image of homelessness and hunger. Rent cannot be paid, and mentally disturbed individuals take up "life" on the streets. Food and other necessities are foregone, causing the precipitous declines in physical and mental health which one might expect.
>
> . . . [When determined incapable and then asked by the SSA to find a payee or wait for the SSA to find one,] many such individu-

---

169 *See id.* § GN 00504.220.

170 *Id.* § GN 00502.410(A)(1)(d). In describing the four phases of the administrative review procedures available to contest a suspension of benefits—protest, reconsideration, ALJ hearing, and appeal to the SSA Appeals Council—the *Briggs* court noted that, "[b]y this point, the claimant will no doubt have developed an abiding, personal understanding of the phrase 'administrative exhaustion.' " Briggs v. Sullivan, 886 F.2d 1132, 1141 (9th Cir. 1989).

171 There is some question whether the suspension of benefits without predetermination hearings that Congress has authorized, particularly of Title XVI beneficiaries who are not drug and alcohol abusers (that is, the aged and disabled poor), could withstand a constitutional challenge based on Goldberg v. Kelly, 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court held that welfare recipients were entitled to notice and hearing *before* their benefits were terminated, in part because of the devastating effect of termination of subsistence benefits on their lives. *Id.* at 266. As noted in *Briggs*, the same consequences can result from a suspension of benefits for lack of a payee. *Briggs*, 886 F.2d at 1135.

172 *Briggs*, 886 F.2d at 1132. In *Briggs*, the agency's practice of suspending benefits was successfully challenged in a 1988 class action suit, which preceded the enactment of the 1990 amendments, brought in Sacramento, California on the grounds that there was no statutory authorization for the practice. The plaintiff class was composed of Title II and Title XVI beneficiaries who had been determined incapable of handling their benefits, who were unable to find representatives satisfactory to the SSA, or whose representatives were no longer able to serve and whose benefits had been suspended by the Secretary. The named plaintiff's benefits in this case were alleged to have been suspended for more than 90 days. *Id.* at 1136.

> als turn to potentially unreliable characters—the fellow residents of homeless shelters, the most casual acquaintances, or the bartenders who provide alcohol abusers with their daily rations—to serve as their "trustees."
>
> The record reveals what, altogether too frequently happens next. The new representatives abscond with the beneficiaries' money or charge them "fees" of up to half of each check. Others, according to the affidavits filed below, will turn over funds only in exchange for sexual services. In some cases, the new representatives are soon judged unfit to serve as payees and payments are withheld once again.[173]

The court of appeals found that temporarily paying incapable beneficiaries could not lead to any worse circumstances than those created by suspending the payment of their benefits, and that suspension was inconsistent with the Secretary's statutory authority to ensure that benefits were expended in the interests of those entitled to them. The court did not rule on the plaintiffs' constitutional claim that suspension of benefits, without notice and an opportunity to be heard, violated due process.[174] Whether authorized by pre-1990 legislation or not, suspension of benefits was never *required*, except in the case of SSI recipients who are disabled by drug or alcohol abuse. The SSA's practice of refusing to pay benefits to other beneficiaries when managerial assistance is needed and payees are unavailable, indicates how far its practices depart from the therapeutic model.

C. *The SSA's Responsibility to Find or Serve as Payee*

The suspension of benefits issue would not arise if the SSA had a clear statutory duty to provide payees to those beneficiaries it has determined need them. However, the agency disavows any legal obligation to find payees or itself to serve as a payee for incapable beneficiaries. Consequently, the lack of available payees for incapable social security beneficiaries is a real and serious problem.

The POMS's guidelines suggest that claims representatives look to nonprofit organizations and public social service agencies when payees are needed.[175] Although the agency was unable to pay a fee for their services in the past, Congress has now authorized the pay-

---

[173] *Id.*

[174] *Id.*

[175] The SSA will appoint as payee a public or nonprofit agency with actual custody, a private, licensed, for-profit institution with custody, or other qualified and willing persons, such as members of community groups or organizations who volunteer to serve as payee for a beneficiary. 20 C.F.R. § 404.2021 (1990); *see also* 1991 POMS, *supra* note 64, § GN 00502.100(B)(2).

ment of fees on a limited basis to certain qualifying organizations.[176] This new authority may help the agency find payees able to fulfill the various needs of different beneficiaries and better perform its mission.

One source of payees for persons who have little property other than their social security benefits is public guardians—persons or agencies that are paid by the state to act as guardians for poor people.[177] Although often overburdened and criticized as inefficient and inadequate,[178] public guardian programs could be improved, through federal grants to the states, so that they could serve as payees of last resort for poor social service beneficiaries. Another source of payees is private volunteer organizations. For example, since 1982, the American Association of Retired Persons ("AARP") has developed a national volunteer payee program, implemented at thirty sites in ten states.[179] The AARP's program is regarded as successful in providing stable, competent, needed financial management services, as well as some personal companionship, to many low income elderly persons.[180] However, the program is not designed to serve beneficiaries who do not want payees, those in difficult situations such as the plain-

---

176 42 U.S.C. §§ 405(j)(4)(A)-(C), 1383(a)(2)(D) (i)-(iii) (Supp. II 1991). Such fees are to be no more than 10% of benefits or $25 a month, whichever is less. It is too soon to know whether those fees can be used to increase the availability of payees.

177 Almost three-fourths of the states have enacted public guardianship statutes creating public agencies to provide support services, including the services of a guardian, to persons in need. SCHMIDT ET AL., *supra* note 38, at 25. Ideally, these public agencies would serve a counseling and coordinating role available to any citizen deprived of his or her capacity to manage financial affairs. ALAN STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 169 (1976).

178 Suffering from lack of funding, these state and county agencies often take on unmanageably large caseloads, are highly bureaucratized, offer little personal relationship, and overuse institutionalization for wards. SCHMIDT ET AL., *supra* note 38, at 15.

179 Telephone Interview with Wayne Moore, Attorney, Legal Counsel for the Elderly (Sept. 9, 1989). The AARP, through Legal Counsel for the Elderly, a department of AARP, provides organizational skills, monitoring, and training to sponsoring organizations such as churches, nonprofit civic organizations, mental health associations, and area agencies on aging. These organizations enlist AARP volunteers to serve as payees for largely low income, elderly persons in their community for whom no more suitable payees are available. The organization's expenses consist largely of administrative overhead. One function critical to this kind of volunteer program is the provision of liability insurance for the negligent mismanagement of benefits by volunteers. In 1990, AARP programs had 271 volunteers serving 324 clients through a variety of subsidiary volunteer organizations. AARP also arranges insurance for liability resulting from the willful and intentional mismanagement by payees. The liability insurance provided does not cover negligent or inadvertent loss of beneficiaries' funds—a contingency for which a reserve fund has been created within AARP funded by a small set aside from members. Legal Counsel for the Elderly seeks to minimize the risk of liability by monitoring payee performance. *Id.*

180 AARP payees serve each beneficiary for an average of seven years. The usual reasons for early termination are death or a move to a nursing home. *Id.*

tiff in *Briggs*, or those suffering from alcoholism or drug addiction.[181] For many years, other private, nonprofit organizations have provided payees services directly rather than through volunteers, but have found it difficult to continue without some reimbursement of expenses.[182] In 1990, Congress amended the representative payee provisions of the Social Security Act (OBRA) to permit the payment of modest fees to such "multiple beneficiary payees."[183]

Monitoring the satisfactory performance of such institutional payees might be very difficult for the SSA if such payees were used on a fee-for-service basis. However, a federally supported system of state licensure for institutional or multiple beneficiary payees—designed to ensure honesty and competence—would mitigate the administrative burden on the SSA.[184] Other nonprofit organizations offer a wide range of educational, supervisory, and advocacy services to low income residents of the community,[185] designed to enable people to retain as much control over their lives as possible.[186] This kind of

---

181 *Id.*

182 *Representative Payee Hearings*, *supra* note 7, at 154-55 (statement of Ronald D. Lantz). The POMS provides that "[i]f a payee notifies SSA that he/she will not carry out his/her fiduciary responsibilities without compensation, SSA will change payees, institute direct payment, or suspend benefits and develop for a new payee, as appropriate." SSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM OPERATING MANUAL SYSTEM § GN 00602.110(B)(2) (1988) [hereinafter 1988 POMS].

183 Such fees may be charged by organizations providing payee services to five or more beneficiaries, if such organizations are licensed and bonded, were in existence on October 1, 1988, and are not otherwise creditors of such beneficiaries. 42 U.S.C. §§ 405(j)(4)(B), 1383(a)(2)(D)(ii) (Supp. II 1991). The prototype multiple beneficiary payee may be Guardian, Inc. of Calhoun County, Michigan. Guardian, Inc. provided services as payee of last resort to low income persons, including mentally retarded persons and drug and alcohol abusers prior to 1988. *Representative Payee Hearings*, *supra* note 7, at 154-55 (statement of Ronald D. Lantz, Executive Director, Guardian Inc. of Calhoun County, Michigan).

184 Under a grant from the Administration of Aging, Michigan has developed standards for individuals and programs providing guardianship and representative payee services. The standards are a result of the collaboration between the Michigan Departments of Social Services and Mental Health, Office of Services to the Aging, the State Court Administrative Office, and Probate Judges Association. These standards have been used to develop model national standards available from the Select Committee on Aging of the United States Senate. *See Representative Payee Hearings*, *supra* note 7, at 148-49, 153 (statement of Stuart White, Legislative Director, Michigan Office of Services to the Aging).

185 These services include education and supervised budgeting, direct financial counseling, money management as a part of independent living programs, and volunteer representative payee and agency representative payee services. Marcia H. Graff, Money Management: A Continuum of Services (undated) (unpublished reference manual, on file with the *Cardozo Law Review*).

186 Representative payee services are provided through trained volunteers who work out their relationship to the client in face-to-face meetings. At these meetings, matters such as budgeting, methods for the payment of bills, and the schedule of future meetings are addressed. Payees are urged to act as their clients' advocates to make sure that their clients are not being taken advantage of by landlords, employers, and creditors. *Id.*

program takes a more affirmative, comprehensive, graded, social services approach to financial incapability than the other private models, like the AARP program, public guardians, or the SSA. Thus, while the SSA may be institutionally unsuited for providing this continuum of services to social security beneficiaries, the agency should explore the feasibility of contracting with organizations using this comprehensive, individualized approach.

Apart from the question of whether the agency is legally obligated to find a payee for beneficiaries whom it has determined are in need of representative payment, if the SSA were to adopt the therapeutic model, SSA guidelines should be revised to give beneficiaries an opportunity to indicate their choice of payees (should one become necessary) when they apply for benefits.[187] The SSA should also require its field offices to take all reasonable steps to find organizational payees, maintain lists of available payees, and assist in the development of such sources.[188] Without such a requirement, there is a risk that when the SSA fails to locate an available and suitable payee for Title XVI beneficiaries, the benefits to which those beneficiaries are entitled will be suspended—thus depriving some beneficiaries of subsistence itself.

D. *The Responsibility to Monitor Payees*

Much of the concern in Congress and elsewhere about the representative payee program has centered around the need to monitor the performance of payees to be sure that beneficiary funds are not misused. An agency impressed with a mission of beneficence should strive to assure not only the selection of appropriate payees, but also the satisfactory performance of their fiduciary duties.[189] The SSA,

---

187 1 C.F.R. 305.91-3 (1992).

188 Interview with Sheila Brown, *supra* note 94.

189 In general, the duties of the payee are those of a fiduciary or trustee. The representative payee is to use payments only for the best interests of the beneficiary, and is to notify the SSA of any events that affect the beneficiary's entitlement to benefits. In addition, the payee must submit a written accounting upon request, and notify the SSA of changes that would affect the payee's ability to perform his or her responsibilities. 20 C.F.R. §§ 404.2035, 416.635 (1992). The SSA is bound to keep the payee informed of any action taken with regard to the beneficiary and to send the payee copies of any notice sent to the beneficiary. Koch & Koplow, *supra* note 15, at 233-34. The payee is also responsible for determining whether to enroll the beneficiary in Part B of Medicare. *See generally* 1991 POMS, *supra* note 64, § GN 00502.163(B). Providing the beneficiary with maintenance (food, shelter, clothing, medical care, and personal needs), including the cost of maintenance in an institution, is a cardinal responsibility. The SSA instructs payees in their obligations. For a statement of payee responsibilities, see *id.* § GN 00502.004. Benefits accumulated by a payee were subject to recovery by a state hospital in payment for the cost of caring for the beneficiary for many years. Department of Health and Rehabilitative Servs. v. Davis, 616 F.2d 828, 832 (5th Cir. 1980). Payment for mainte-

however, has maintained that it has no legal obligation to do either and, even with the prodding of federal courts, has done little to assure the actual provision of assistance in this way.

Until the ruling in *Jordan v. Schweiker*, the SSA maintained that the obligation to supervise payees' performance of their obligations to beneficiaries was discretionary and not reviewable under the Administrative Procedure Act ("APA").[190] However, in 1983, the district court in *Jordan* held that due process required the SSA to conduct mandatory, periodic universal accounting of representative payments.[191] The SSA now requires annual accountings from all repre-

---

nance charges in an institution is proper only when state law provides that the resident's estate is liable for his or her care and maintenance. *See* SSR (Social Security Rulings) 66-20, 68-18 (C.B. 1966-1970). Payment of attorney's fees incurred in an effort to gain a beneficiary's release from an institution is also proper. *See* SSR (Social Security Ruling) 66-42 (C.B. 1966-1970). Any funds not needed for the support of the beneficiary or legal dependents must be conserved or invested in accordance with general rules applicable to trustees, preferably in government bonds or interest-bearing accounts in insured banks or credit unions. 20 C.F.R. §§ 404.2045, 416.645 (1992).

[190] *See* Watson v. Califano, 487 F. Supp. 179 (S.D.N.Y. 1979), *aff'd sub nom.* Watson v. Harris, 622 F.2d 577 (2d Cir. 1980). Prior to 1979, the SSA had required payee accounting on a random sample basis, but discontinued the requirement in that year to reduce administrative costs. The APA is codified at 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. II 1991).

[191] Jordan v. Schweiker, No. 79-994-W, slip op. at 17 (W.D. Okla. March 17, 1983). The court noted that the *Watson* decision was dismissed on jurisdictional grounds and that no due process claim had been made in that case. Because of the complex interaction of a number of appeals and motions filed by the SSA in the district court, the *Jordan* ruling became an unappealable, final judgment, without affirmance by the court of appeals, binding on the parties to the suit.

The *Jordan* suit was brought in 1979 by several social security beneficiaries who claimed to represent a class consisting of all social security beneficiaries receiving benefits under Titles II and XVI. The names of the proceedings in the *Jordan* case can be confusing. The case was filed on September 7, 1979 under the caption Jordan v. Schweiker, No. Civ. 79-994-W. The district court's order of March 17, 1983 and March 26, 1984 were also issued in the case under that name. The district court's order on July 2, 1984 was issued under the caption Jordan v. Heckler, No. CIV-79-994-W, as was the opinion of the Tenth Circuit Court of Appeals, *see* Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984), and the district court's order on remand (January 18, 1985). The SSA's second appeal, an appeal from the January 18, 1985 order, was decided by the Court of Appeals in Jordan v. Bowen, 808 F.2d 733 (10th Cir. 1987), *cert. denied*, 484 U.S. 925 (1987). The class was certified in September, 1980. The plaintiffs presented three challenges to the SSA's practices: first, they claimed that they were entitled to an oral hearing prior to the initial selection or continuation of a payee; second, they claimed that they were entitled to periodic mandatory accounting by their payees; and third, they claimed that they were entitled to full administrative and judicial review of claims of misuse by their payees under the Due Process Clause of the Fifth Amendment and the Social Security Act. Jordan v. Schweiker, No. 79-994-W, slip op. at 3-4. The district court ruled that the plaintiffs were not entitled to pre-selection oral hearings or administrative and judicial review of misuse claims, but did find that the Due Process Clause required "mandatory periodic accounting" by payees. Applying the Mathews v. Eldridge, 424 U.S. 319, 335 (1976), factors, the court found that the plaintiffs' interest in receipt and proper use of social security benefits was substantial, that the risk of erroneous deprivation of their interest through the SSA's procedure was great, and that the probable value of mandatory accounting was substantial. The

sentative payees. However, the annual accounting form required of payees, Form 623, requests relatively little information and the agency has been criticized for not using the scant information provided to uncover misuse of funds.

Questions have been raised about the value of the present universal annual accounting procedure as a method of assuring the proper performance of payee responsibilities. On the one hand, the SSA argues that universal accounting is burdensome and that only high risk payees should be monitored because misuse of beneficiary funds correlates with the nonrelative, noncustodial status of the payee.[192] On the other hand, advocates for the elderly argue that the present procedures are ineffective because the SSA requests too little information from payees and fails to verify and follow up on information disclosed.[193] More important, they argue that the annual accountings have a significant deterrent effect, much like the random audits conducted by the IRS, that would be lost if universal accounting were not required.[194] The agency's unwillingness to develop an efficient and effective monitoring procedure, perhaps in cooperation with the liti-

---

fiscal and administrative burden on the SSA, estimated to amount to a cost of $2.17 per beneficiary in representative payment, was found not to be too great. The defendants had claimed that the SSA realized the $9.7 million cash value of the 489 work-years saved by eliminating accounting and verification. Dividing that sum by the 4,460,123 Title II and Title XVI beneficiaries who had representative payees, plaintiffs claimed the savings resulting from the elimination of accountings amounted to $2.17 per beneficiary in payee status. Jordan v. Schweiker, No. 79-994-W, slip op. at 16.

192 In 1984, Congress amended the Social Security Act to exempt spouses and parents with custody from annual accounting requirements. However, the *Jordan* court held that the SSA's constitutional obligation to provide due process was not affected by such legislation. Jordan v. Schweiker, No. 79-994-W, slip op. at 5-6; *see also* Jordan v. Bowen, 808 F.2d at 733; Farrell, ACUS Report, *supra* note 5, at 92-95.

193 The SSA asks payees to report the beneficiary's marital status, whether there are accumulated funds, and if so, where they were invested. The SSA also asks whether the payee has ever been convicted of a felony. The representative payee must check appropriate boxes, sign the form, and return it to the SSA. The forms are processed at the SSA process centers and any question raised by the forms are referred to the payee's local office for follow-up. Interview with Sheila Brown, *supra* note 94. Court-appointed guardians or conservators may file a copy of accounting reports required by the court in lieu of Form 623. Institutional payees are audited through on-site inspection conducted by the SSA. Pursuant to congressional instructions, and with approval of the district court in *Jordan*, the SSA has established a system of accountability in monitoring for institutions in each state. *See* 42 U.S.C. § 405(j)(3)(C) (1988). Most state mental institutions, mental retardation centers, mental health centers, and public mental hospitals are monitored by the SSA's on-site review program. They do not submit annual accounting forms for each beneficiary, but are visited every three years by review teams who interview staff and patients to determine the institution's payee performance. If the payee fails to comply with the accounting requirements within a reasonable time without good cause, payments to the payee may be terminated. 20 C.F.R. §§ 404.2050(f), 416.650(f) (1992).

194 Telephone Interview with Neil S. Dudovitz, Deputy Director, National Senior Citizens Law Center, Los Angeles, California (August 17, 1989).

gants in *Jordan*,[195] indicates its general reluctance to accept full responsibility for the social service program.

E. *The Responsibility for Misused Funds*

Although the objective of universal annual accounting required by *Jordan*[196] is the prevention and discovery of misuse, the agency does not permit either beneficiaries or payees to appeal findings of misuse.[197] Misuse usually comes to the attention of the SSA through complaints by the beneficiary, information from the VA where the beneficiary is receiving dual benefits, accounting reports, or evasive statements by the payee when in contact with the SSA.[198] The determination of misuse is made by the claims representative after he or she has made an investigation of the facts.[199] Neither the beneficiary who is dissatisfied with a finding of no misuse, nor a payee who is dissatisfied with a finding of misuse, may obtain administrative review of this determination.[200] The payee may dispute the finding of misuse if civil or criminal actions are brought by the agency on the basis of a finding of misuse, but a payee does not have standing under the regulations to appeal the claims representative's finding or a termination of his certification or a change in payee. Nevertheless, the payee's continued status and her ability to serve as a payee for another beneficiary are affected by the determination. The beneficiary, also, is without administrative recourse.[201] Section 205(k) of the Social Security Act provides that payment to a certified representative payee is "a complete settlement and satisfaction of any claim, right, or interest in

---

195 Jordan v. Schweiker, No. 79-994-W, slip op. at 1-3.

196 *Id.*

197 1991 POMS, *supra* note 64, § GN 00502.410(B). The SSA makes a distinction between improper use of funds and misuse. Improper use of funds consists of expenditures which are well intentioned but not in the best interests of the beneficiary, such as the payment of past debts while the beneficiary's needs go unmet. When the SSA suspects improper expenditure of funds, it will contact the payee, discuss the situation and suggest better management. 1988 POMS, *supra* note 182, § GN 00602.130.

198 Misuse of benefits occurs when a payee expends benefits for reasons other than the benefit of the beneficiary. 1989 POMS, *supra* note 100, § GN 00604.010(A).

199 *Id.* § GN 00604.020(B).

200 SSA regulations do not specify misuse determinations as initial determinations to which notice and appeal rights apply, and the POMS provides that a determination that benefits were misused cannot be appealed. 1991 POMS, *supra* note 64, GN § 00502.410(B).

201 For example, in Jordan v. Schweiker, No. 79-994-W, slip op. (W.D. Okla. March 17, 1983), the plaintiffs unsuccessfully sought a declaration that due process requires an appeal of an adverse misuse determination by the Secretary. Using the *Mathews* calculus, the *Jordan* court held that the value of administrative and judicial review of claims of misuse would not be sufficiently substantial to outweigh the fiscal and administrative burdens that their provision would entail. *Id.* at 19. ACUS has recommended that both beneficiaries and payees be permitted to appeal misuse determinations. 1 C.F.R. § 305.91-5 (1992).

and to such payment."[202] Beneficiaries who charge that their benefits have been misused by payees cannot appeal a determination by the SSA that they have not been misused. Although beneficiaries may be able to sue their payees to recover misused funds under state laws, they often do not have the resources or sophistication to do so. Thus, unless the Secretary makes a finding of misuse and seeks restitution from the payee, the beneficiary is very often without an effective remedy.

Even where the agency finds misuse, the SSA rarely succeeds in restoring the beneficiary's lost funds. In cases of misuse, the agency will first notify the payee. Then the SSA will consider changing the payee, seeking restitution in civil proceedings, or referring the case to the U.S. Attorney for criminal prosecution.[203] The SSA may also continue payment to a payee who has misused benefits, if the payee makes or agrees to make restitution,[204] although restitution of the beneficiary's funds is seldom accomplished.[205] The agency's failure to study the misuse problem and to propose solutions to Congress is an

---

202 Social Security Act § 205(k), 42 U.S.C. § 405(k) (1988).

203 The SSA considers a representative payee who misuses benefits to be indebted to the beneficiary and obligated to make restitution. 1989 POMS, *supra* note 100, § GN 00604.080(A). The SSA will not withhold the benefits to which the representative payee is entitled in his or her own right in order to recoup misused funds, because such withholding would be tantamount to an administrative attachment in conflict with § 207 of the Social Security Act, 42 U.S.C. § 407 (1988). *Id.*

Nevertheless, the SSA will demand restitution, unless, in the opinion of a reviewer in the regional office, the payee is unable to repay funds, continued recovery efforts cannot be justified, or the payee cannot be located or has died. *Id.* § GN 00604.110(A)(2). The payee may make restitution to the SSA for recertification to a new payee, to the beneficiary if determined capable of managing the benefits, or to the beneficiary's estate. The SSA regards itself as obligated to obtain restitution of misused funds on behalf of the beneficiary, regardless of the disposition of money so recovered. Thus, even if the payee is an institution which will apply restored funds to its own maintenance charges to the beneficiary, the SSA will seek recovery. *Id.* § GN 00604.080(B)(1). Efforts to recover misused funds will be abandoned where prosecution of the payee is found not to be in the beneficiary's best interest, as where the misuse is by a parent or spouse. 1989 SSA ANN. REP. TO CONGRESS 32 n.4. A form 553 must document the efforts made to secure restitution, the reasons why those efforts were abandoned, and the reasons why further recovery efforts would be unproductive. 1989 POMS, *supra* note 100, § GN 00604.110(B). In addition, a notification is sent to the payee by the field office even if it does not intend to take any subsequent action to obtain restitution. *Id.* § GN 00604.050.

204 1989 POMS, *supra* note 100, § GN 00604.060.

205 For example, in its 1989 Report, the SSA indicated that misuse was discovered and recovery efforts initiated in 489 cases, and that 629 cases (some from prior years) were abandoned because the payee had died, could not be found, had no resources, or it was not in the beneficiary's interest. In 82 cases, misused funds were recovered, and nine of the cases were referred to the U.S. Attorney for civil suit. The SSA requests criminal enforcement and the U.S. attorney prosecutes payees in only a handful of cases each year probably because the amounts are small and criminal proceedings are expensive. *See* 1989 SSA ANN. REP. TO CONGRESS 32.

additional indication of its lack of dedication to the beneficent goals of the representative payee program.

In contrast, recovery of misused funds is assured in state guardianship through underwriting arrangements. State laws require guardians to post bonds insuring their fidelity, the cost of which is covered by their fees.[206] If the SSA were to reimburse beneficiaries for losses resulting from payee mismanagement and theft, it would, in effect, provide such insurance for all payees; the cost would be borne by all social security beneficiaries, not just those in representative payment. The SSA could then seek restitution from payees as subrogee of the beneficiary's claim. If the SSA were responsible for payee losses, it would have greater incentive to investigate and select payees carefully and to effectively monitor their performance.[207] Although the agency does not currently have authority to implement an underwriting program, dedication to the best interests of beneficiaries should require the SSA to study this means of furthering them.[208]

In some instances, the SSA has accepted liability for misuse of funds occasioned by its own negligence.[209] The agency's policy of

---

[206] This kind of fiduciary or liability insurance should also be available to SSA payees, but is seldom, if ever, purchased. The SSA does not require it and its cost cannot be recovered from the funds administered since SSA rules preclude the use of benefits to pay such administrative costs.

[207] However, unlike other insurers, the SSA would be in a position to make a final and unappealable determination of its own loss—that is, whether a payee has, in fact, misused funds. If it were to reimburse beneficiaries when misuse occurs, the SSA would increase its losses by finding misuse and would have a conflict of interest with regard to them. Nevertheless, as discussed below, the agency currently discharges similar functions when it assumes misuse losses if the agency has not discharged its investigatory and other monitoring responsibilities with "good acquittance."

[208] ACUS has recommended that the SSA research the use of loss underwriting arrangements to ease the burden on beneficiaries occasioned by the misuse of funds. 1 C.F.R. § 305.91-5 (1992).

[209] In Holt v. Bowen, 712 F. Supp. 813 (D. Colo. 1989), plaintiff recovered misused funds from the Secretary, where representative payment was made to a payee the Secretary had failed to investigate, contrary to his statutory obligation. The plaintiff, a disability beneficiary, claimed that his representative payee absconded with lump-sum benefits of over $7,000. Unable to recover from the payee, Mr. Holt sought recovery from the Secretary. The court found that the SSA had breached its statutory obligation to investigate Mr. Holt's payee before the payee's appointment. Citing the Secretary's own policy of repaying misused benefits when the agency failed to make payment with "good acquittance," the court also found statutory and regulatory authority for the reimbursement. It held that the Secretary could not make a "correct payment" pursuant to the statute without first properly investigating the suitability of the payee. Thus, the Secretary could not claim the protections of § 205(k). The court cited the Conference Report to the Social Security Benefits Reform Act of 1984, which directed the Secretary to establish procedures under which large lump-sum payments of retroactive benefits would not be paid to new representative payees until after the investigation of their suitability had been completed. The court did not find that the beneficiary had a *due process* right to recovery of the funds. Yet, the court noted that "[i]nherent in the determination of incompe-

"good acquittance" provides that the SSA is liable for misused funds if the benefits were not properly paid based upon the information available to the agency at the time of payment.[210] However, the policy can be invoked only if the agency did not investigate an allegation of misuse in a timely fashion after receiving complaints, did not follow proper procedures in investigating and selecting the payee, or made payment to the misusing payee after attempting to timely suspend benefits, establish direct payment, or appoint a successor payee.[211] Congress provided in the 1990 amendments to the Social Security Act (OBRA) that the SSA shall repay funds lost through misuse resulting from the SSA negligence in investigating or monitoring payees.[212] However, like SSA determinations of misuse, determinations of "good acquittance"—which absolve the SSA of responsibility under the POMS to repay misused benefits—are not considered initial determinations by the SSA and, therefore, cannot be appealed by the beneficiary.[213] Because of the ineffectiveness of other remedies, both beneficiaries and payees should be permitted to appeal misuse and "good acquittance" determinations.

V. RETHINKING REPRESENTATIVE PAYMENT

In summary, the representative payee program administered by the Social Security Administration is an unusual example of the exercise by the federal government of what have been traditionally regarded as state *parens patriae* powers. States have exercised these powers to protect the property and well-being of mentally and physically impaired people by appointing a guardian to act on their behalf.[214]

In an effort to assess the ability of the SSA to meet demands for mass justice in the appointment of trustworthy payees for some four million Americans, this Article has held the representative payment program up to two models of justice, each premised on a preference for protecting beneficiary interests in autonomy or assistance. A de-

---

tency by the Secretary is the assumption of responsibility that a proper representative payee will be selected." *Holt*, 712 F. Supp. at 818. Thus, there was some recognition of implied affirmative obligations attached to the Secretary's exercise of the authority to declare the beneficiary incapable of handling his own benefits. *Id.* at 808.

210 1989 POMS, *supra* note 100, § GN 00604.070.

211 *Id.*

212 *See* 42 U.S.C. §§ 405(j)(5), 1383(a)(2)(E) (Supp. II 1991). The determination of good or bad acquittance is made by the regional office at the suggestion of the local SSA office.

213 ACUS has recommended that misuse determinations be appealable both by beneficiaries and payees. 1 C.F.R. § 305.91-5 (1992). In any event, *Holt* recognizes a judicial mechanism for the enforcement of the SSA's policy. *Holt*, 712 F. Supp. at 814.

214 *See supra* notes 54-60 and accompanying text.

tailed analysis of the agency's standards, practices, and procedures makes clear that the SSA has not effectively adopted either model. The question becomes, should the SSA embrace one or the other of these sometimes antithetical models in order to claim that its program is a legitimate exercise of paternalistic authority? And, if so, which one?

Historically, states have exercised their *parens patriae* powers through agencies that separately seek to promote either autonomy or beneficence. Thus, state courts are entrusted with the protection of autonomy interests through guardianship proceedings that are basically adversarial in nature, while social service agencies, as well as guardians, are given the responsibility for providing management assistance. On the federal level, however, a single agency has been delegated responsibility for both. The SSA is granted broad discretion to balance the values put in conflict by paternalism and to cast itself in the mode of either courts or social service agencies. As this Article's analysis shows, it cannot be claimed that the SSA has chosen either, or even that it has chosen both. Its procedures neither adequately protect beneficiary interests in controlling money benefits nor adequately assure the beneficial assistance of payees. We have seen that the SSA's reluctance to establish meaningful standards of capability, to provide beneficiaries predetermination notice and interviews, to investigate and verify information from payees, to monitor their performance effectively, to assure the management services of a payee where the agency has determined they are needed, to review determinations of misuse, to aggressively seek restitution of misused funds, and to permit review of its own fault in causing misuse—all indicate that the SSA does not see itself as an agency devoted either to protecting the autonomy of beneficiaries or benevolence. Yet, without legitimate determinations of capability or the assurance of needed services, the moral claim that government interference in the expenditure of benefits is justified is without force.

The most fundamental problem confronting the SSA in the administration of the representative payment program is the lack of policy direction from Congress. Congress has given the agency little direction with regard to how it should weigh or prioritize conflicting interests that its paternalistic mission puts in conflict. Despite its micromanagement of certain aspects of the representative payee program, Congress has yet to articulate the primary objectives of the program. Not knowing what Congress hoped to achieve by granting the Secretary discretion to certify indirect payment, the SSA could not know how to exercise that discretion consistent with the legislative

will. Congress may have intended the authority to serve any of several possible objectives. It may have intended to permit qualified payees to spend benefits in ways that they determine will benefit disabled beneficiaries. Or, Congress may have intended the Secretary to determine what constitutes wise expenditure of benefits and effectuate that determination through the supervision of federally appointed payees. Finally, Congress may have intended payees to expend benefits as the disabled beneficiary would have expended them were he or she not incapable of doing so. At the same time, Congress may have intended to facilitate the transactions in which benefits are expended by removing legal impediments based on a lack of capacity to contract, fraud, and duress. Because the agency does not know what it is required to accomplish, it has little idea how to exercise its discretion and, consequently, exercises it inconsistently and ineffectively.

In addition, Congress has granted paternalistic authority to an agency that is essentially a payment agent with expertise in making entitlement determinations and proficiency in making money payments to beneficiaries. The SSA has little or no experience as a social service agency. Its personnel are trained to provide assistance to the public in the form of efficient money payments. These personnel do not expect or aspire to careers in community service. Further, the agency lacks the bureaucratic structures necessary to reach out to dependent beneficiaries, to evaluate their disabilities, to assess their need for assistance, to find and provide qualified payees, and to supervise the provision of benefit management services. Therefore, much of the SSA's difficulty is due to lack of congressional guidance, and the ambivalence it creates as well as the institutionally inappropriate task that Congress has assigned the agency. The SSA is structurally ill suited and bureaucratically ill disposed to provide procedural safeguards that would protect individual liberty interests and interests in social assistance that traditionally has been provided by state courts and local social service agencies. Congress must take responsibility for not requiring or providing the SSA the resources to adopt either the legal justice model or the therapeutic justice model.

An examination of the concept of paternalism may suggest an answer to the question of which model of justice the SSA should adopt in the representative payee program. The models that this Article has used to evaluate the SSA's performance bifurcate the concept into its components and set them against each other—the limitations on autonomy in the name of beneficence and the restraints on beneficence to protect autonomy. As we have seen, conflicts between these values do occur, and the black and white abstractions of autonomy

and beneficence are useful in understanding the antagonistic values embraced by paternalism. But, as one knows, the world is not painted in black and white, but in many shades of grey. The problems presented by old, tired, poor, infirm, frail, confused people do not fall neatly into boxes labeled autonomy (complete control over benefits) and beneficence (no control over benefits). Instead, the problems are complex, relational, situational, and temporal. The SSA would do well to adopt procedures that permit the reflection of the multifaceted nature of both the capabilities of beneficiaries and the assistance they need. Many beneficiaries have need for *both* autonomy and assistance in varying degrees, not interests in one to the exclusion of the other.

To find that the SSA has not adopted either a legal or a therapeutic model is not to say that it should adopt one or the other. As a single agency performing both adjudicatory and social service functions, the SSA should select components of the two models that best achieve the purposes representative payment was meant to serve. Since Congress has not provided explicit or implicit guidance as to those purposes, the agency must make those policy judgments consciously through rule making or adjudication, not sub rosa through nonprecedential discretionary determinations made by line personnel. The agency can minimize its task and the difficulties that the imposition of representative payment presents by capitalizing on the grey areas. Thus, the agency should devise means of respecting legitimate exercises of autonomy by obtaining the voluntary consent of beneficiaries to needed management services whenever possible. For example, the agency should permit beneficiaries, when they apply for benefits, to indicate under what circumstances they would want the agency to provide payee assistance and whom they would select as payee, much as people do when they execute powers of attorney. While such preferences need not necessarily be legally binding, they would be helpful to the agency in exercising its payee authority in the future. Perhaps the most fundamental need is for a standard of incapability that is based on a concept of minimally acceptable competence to perform identified essential functions—such as the ability to expend benefits to obtain minimally acceptable food, shelter, clothing, and medical care. Although limited, such a standard would make it clear that only an inability to secure basic elements of subsistence and maintenance will result in the appointment of an unwanted payee and that the expenditure of funds in unusual or socially unacceptable ways will not be used as the standard. Incapability determination procedures should then be reformed to permit an individual functional assessment to be made by trained personnel of each beneficiary—when

such beneficiary does not seek or at least agree to proposed representative payment—to be used in conjunction with and not instead of physician evaluations and state legal incompetency determinations.[215]

Similarly, the SSA can respect both beneficiary interests in controlling their benefits and their need for help in doing so by offering a variety of managerial services that beneficiaries would welcome. Thus, the agency should seek to make assistance available in several forms, not merely the all-or-nothing imposed payee arrangement currently presented. Some beneficiaries just need help in receiving and understanding notices from the agency; others need help in scheduling and paying their bills; others would be thankful for some help in deciding how to expend their benefits. The agency should make education about benefit management, supervision of personal budgeting and expenditures, and physical assistance in executing monetary transactions available on a voluntary basis in those situations in which termination of legal authority over benefits is not necessary to the provision of the assistance that is needed. Such assistance could be provided directly by the agency or by public and private agencies through contracts.

Still, in some circumstances, beneficiary interests in benefit control and agency interests in imposed assistance will conflict. When assistance is rejected and a person with sufficient interest in the beneficiary to have standing requests a determination by the agency that assistance is needed and competence is impaired, the agency must prefer one justice model over the other. For instance, before a determination of capability has been made, the legal model will privilege autonomy interests by imposing the persuasion burden on those who would impose a payee and provide early notice and an opportunity for a hearing. The therapeutic model would privilege beneficence by permitting such determinations to be made by professionals with diagnostic expertise. This Article would privilege autonomy interests over assistance during the determination process and require that beneficiaries be informed of agency proceedings *before* incapability determinations are made and be offered the opportunity to meet informally with agency decision makers before the agency makes its initial determination. In addition to soliciting useful information about beneficiaries, such procedures are valuable because they demonstrate the agency's respect for the worth and dignity of beneficiaries.

However, after incapability has been determined, imposed representative payment can be justified only if impaired beneficiaries are

---

215 *See supra* note 80 and accompanying text.

actually assisted in managing their benefits. Thus, the therapeutic model assuring individualized services and remediation should be adopted. The SSA should accept responsibility for the provision of adequate payee services for all beneficiaries who need them. Most fundamentally, the SSA should stop suspending benefits when it has the statutory authority to do so and should aggressively search for payees or provide payee services itself to drug and alcohol abusing SSI recipients who cannot otherwise be provided payees.[216] Furthermore, the agency should undertake demonstration projects in which private and volunteer payee services are provided, with and without payment, in order to develop larger sources of payee assistance.[217] The SSA should redesign its universal annual payee accounting system to monitor payee performance more effectively in an effort to deter misuse of funds. Similarly, it should explore the use of various underwriting arrangements to secure beneficiaries against loss because of payee misuse that cannot be corrected through restitution.

If Congress chooses to continue representative payment as part of the federal social security program, a bureaucratic structure should be created within the SSA that can perform both its adjudicatory functions and its social service functions more effectively. If the SSA were to initiate state guardianship proceedings where appropriate, establish a standard of minimally adequate competence, and provide additional procedures to safeguard individual autonomy interests in need determinations, then the number of beneficiaries in representative payment, and, hence, the SSA's oversight responsibilities, should diminish. If that were to occur, the agency should have greater resources with which to provide voluntary management assistance and to monitor and enforce the fiduciary obligations of payees.

Finally, Congress would do well to carefully consider the need for and full implications of the exercise of *parens patriae* powers on the federal rather than the state level. Strong arguments can be made that social security benefits have no distinctive character that requires their protection by a federal representative payee program rather than by state guardianship or protective services programs established to protect other property interests of vulnerable people. If that is true, compelling reasons must be provided for not utilizing state guardianship mechanisms to provide needed protections. None have been articulated by Congress. Since many states do not have adequate resources to adjudicate the competence of large numbers of social se-

---

216 42 U.S.C. §§ 405(j)(2)(D), 1383(a)(2)(B)(vii) (Supp. II 1991).

217 *See supra* notes 183-86 and accompanying text, concerning Congress's 1990 authorization of payment to certain payees on a limited basis.

curity beneficiaries or to provide the social services to assist low income beneficiaries in need of financial management services, federal funding of state efforts to develop and monitor adequate judicial and social services should be considered as an alternative to funding the SSA for these purposes.[218] Congress could grant funds to the states to develop, license, and monitor private and public agencies to find payees and supervise the provision of payee services rather than try to provide these services to four million people through a single federal administrative agency institutionally unsuited for the task.

---

218 For a description of several private programs developed to provide benefit management services, see Farrell, *supra* note 5, app. II.