DOING UNTO OTHERS: A PROPOSAL FOR PARTICIPATORY JUSTICE IN SOCIAL SECURITY'S REPRESENTATIVE PAYMENT PROGRAM

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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. Rawls, *A Theory of Justice* 248-249 (1971).

I. INTRODUCTION

To keep certain social security beneficiaries from squandering their benefits and to protect them from exploitation, Congress has authorized the Social Security Administration (SSA) to pay these beneficiaries' benefits to friends, relatives or other persons or organizations to be expended on their behalf.[1] The resulting "representative payee program" currently pays about $20 billion in social security benefits to representatives of more than four million Americans. In most instances, it provides beneficiaries welcome assistance in managing their day-to-day financial affairs. Yet, like other examples of government paternalism, the representative payee program limits individual legal rights and autonomy, in this case, a beneficiary's right to control the expenditure of federal benefits, with or without consent, in order to provide assistance and protection.[2] This article explores the legitimacy of SSA's ex-

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1. Social Security Act Amendments of 1939, ch. 666, as *amended by* Omnibus Budget Reconciliation Act of 1990 (OBRA), § 5105, (codified as amended at 42 U.S.C.A. § 405(j)(1) (West 1991)), pertaining to benefits paid under Title II of the Social Security Act states:

> 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.

The Social Security Act, § 1631 *as amended by* OBRA 1990 (codified at 42 U.S.C.A. § 1383(a)(2)(A) (West 1992)), pertaining to benefits payable under Title XVI of the Social Security Act states:

> (i) Payments of the benefit of any individual may be made to any such individual or to the eligible spouse (if any) of such individual 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, such payments shall be made, regardless of the legal competency or incompetency of the individual or eligible spouse, to another individual or an organization . . . for the use and benefit of the individual or eligible spouse.

2. Unlike other examples of government restraint on conduct, such as helmet and seatbelt laws, the limitations inherent in the representative payee program can be viewed as conditions on governmental largess—old age, disability and income assistance benefits—and therefore less an infringement of legally protected property and liberty interests. However, as social security bene-

ercise of that discretionary authority and its balancing of the often conflicting interests in individual autonomy and the provision of assistance. The fact that the number of persons affected by the representative payee program is enormous presents serious "mass justice" issues concerning SSA's ability to affect individual interests accurately and fairly.[3] In addition, the fact that SSA's discretionary authority is almost unlimited by the Constitution, the Social Security Act or the Administrative Procedure Act (APA) raises questions about why we should respect SSA's pronouncements as law. Resolution of these issues may well establish principles that will shape future paternalistic efforts by the federal government, including those of the other federal payment programs that use the representative payee mechanism.[4]

In 1990, Congress enacted two pieces of legislation relevant to the representative payee program. In one, Congress amended the Social Security Act (the Act) to resolve specific administrative issues involved in representative payment, but left more fundamental issues unaddressed.[5] In the other, the Negotiated Rulemaking Act of 1990, Congress established a mechanism for promulgating agency rules through the participation of persons and organizations with interests affected by the rulemaking.[6] This article takes the position that the legislative approach taken in amending the Act cannot be invoked consistently or

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fits are conceived under the Act, beneficiaries who are subject to representative payment must be finally determined to be entitled to receive their benefits before certification payment to a representative payee is authorized. 42 U.S.C.A. § 405(i), (j) (West 1991). Subsection (i) provides "[U]pon final decision of the Secretary, or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this subchapter, the Secretary shall certify [direct payment]." 42 U.S.C.A. § 405(i) (West 1991).

3. These issues have been explored elsewhere in the context of benefit entitlement determinations. *See, e.g.*, Robert G. Dixon, Jr., *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681; JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

4. In addition to SSA's representative payee program, Congress has authorized other federal agencies to pay benefits to a representative payee when it is in the beneficiary's interest to do so. The representative payee authority of the Department of Veterans Affairs is found at 38 U.S.C.A. §§ 5502-5504 (West 1991); 38 C.F.R. §§ 13.1-.111 (1991). *See* Margaret Farrell, *Administrative Paternalism: Social Security's Representative Payment Program and Two Models of Justice*, 14 CARDOZO L. REV. (forthcoming 1992) for a description and analysis of the Veterans Affairs representative payee program, called the "fiduciary" program. The representative payee authority of the Railroad Retirement Board is found at 45 U.S.C. § 231k (1988); 20 C.F.R. §§ 266.1-.13 (1990). The representative payee authority of the Office of Personnel Management for retired federal employees is found at 5 U.S.C. § 8345(e) (1988).

5. *See supra* note 1.

6. Negotiated Rulemaking Act of 1990, P.L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C.A. § 581-590 (West Supp. 1992).

effectively to administer a large, complex, dynamic program such as representative payment. Rather, the proper use of legislative authority in this area would seem to be the establishment of basic policy objectives for representative payment—something Congress has failed to do.[7] In the absence of such direction, Congress might have instructed SSA to initiate negotiated rulemaking proceedings to establish administrative standards and procedures through consensus rules proposed by persons with interests affected by the program. Not only would such a process provide a more appropriate forum for refining policy objectives and procedures, it would provide legitimacy to the resulting administrative rules as discussed below.

Representative payment is not a payment or entitlement program: it is a social service program and the issues it presents have just begun to be examined.[8] Thus, although SSA is experienced in meeting demands for accuracy and fairness on a massive scale in the social security payment programs, particularly the disability program,[9] SSA is not experienced in meeting these same demands in the representative payee program because it is not a payment program. Rather, it is a form of non-voluntary assistance that presents issues that do not arise in the payment entitlement programs. First, unlike most other federally-provided benefits, there are no standards or criteria which, if met, will entitle a beneficiary to the assistance of a payee. The Secretary of Health and Human Services (the Secretary) is simply given the authority to make payments to a payee when he or she finds that it is in a beneficiary's interest to do so. Furthermore, SSA may do so whether or not the beneficiary consents to representative payment. Thus, while entitlement to monetary benefits is not at issue in representative payee determinations, autonomy interests, self-esteem, reputation and the ability to transact business in the community are at stake. Third, because social security beneficiaries have been determined to be entitled to monetary benefits, the Secretary must make payment whether or not the beneficiary is found to need a representative payee. Thus, unlike

7. See Farrell, *supra* note 4.

8. *See generally* MARGARET G. FARRELL, ADMIN. CONF. OF THE U.S., THE SOCIAL SECURITY ADMINISTRATION'S REPRESENTATIVE PAYEE PROGRAM: PROBLEMS IN ADMINISTRATIVE PATERNALISM 1991; Farrell, *supra* note 4; Melissa Reiner Greener, *The Social Security Administration's Representative Payee Program: An Act of Benevolence or Cruelty?*, 12 CARDOZO L. REV. 2025 (1991).

9. *See, e.g.*, MASHAW, *supra* note 3, at 121 (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).

the entitlement programs where eligibility determinations directly affect the public purse, the government's only financial interest in representative payment is in containing administrative costs. Lastly, SSA's findings that some beneficiaries are incapable of managing their affairs are made for many of the same reasons that support guardianship and commitment determinations. Yet, these determinations are usually made by state courts exercising *parens patriae*[10] powers; not a federal, administrative agency carrying out a congressional exercise of spending power. In addition, SSA's on-going responsibility to supervise payees is the kind of social service that has traditionally been provided by non-judicial social service agencies and not by an agency whose historic mission has been the efficient payment of money benefits. In sum, representative payment is non-monetary, protective assistance to which there is no entitlement, provided to social security recipients with or without their consent, by a federal administrative agency.

The legitimacy of SSA's exercise of its discretionary, paternalistic authority to compel or withhold benefit management assistance is explored in this article. Representative payment is not paternalistic in a derogatory sense, but in its original sense of providing assistance and protection to dependents. SSA can be viewed as a federal administrative agency struggling—with little guidance from Congress, the courts or its huge constituency—to use its broad discretion to reconcile competing interests in individual autonomy and social benevolence that are necessarily put in tension by its paternalistic mission.[11]

This article is presented in four parts. After this Part I, Part II describes the standards and procedures used to administer the represen-

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10. *Parens patriae* means literally "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The term refers to the prerogatives and responsibilities of the sovereign to protect persons with legal disabilities, such as minors and persons with mental disabilities. SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 369-71 (3d ed. 1985). *See also* Hawaii v. Standard Oil, 405 U.S. 251 (1972). Thus, the appointment of guardians to protect the person and property of minors ("infants"), mentally defective persons ("idiots") and mentally ill persons ("lunatics") is an exercise of parens patriae powers. *See generally* AMERICAN BAR ASSOCIATION, THE MENTALLY DISABLED AND THE LAW v-vii (Samuel J. Brakel & Ronald S. Rock eds., revised ed. 1971).

11. A government that imposes assistance and protection involuntarily upon persons who do not consent has been termed a "therapeutic state." The therapeutic state differs from the "welfare state" in that the latter makes assistance (such as disability benefits) available only on a voluntary basis. NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971). Representative payment can be viewed as one of only a few examples of the therapeutic state on the federal level. Other examples would include the program of the Department of Veterans Affairs (VA) for incompetent recipients of VA benefits, discussed below, and labor laws that further the interests of minors who desire to work by prohibiting their employment.

tative payee program and analyzes them to determine the extent to which they protect individual autonomy and interests in assistance. Part III discusses the concept of legitimacy as it is used here, and the extent to which legislative directives, agency expertise and accountability through the chief executive support the claim that SSA's administration of representative payment is legitimate. Part IV explores the possibility that SSA's actions gain legitimacy by conforming to constitutional due process requirements, thus embodying substantive values that have been ratified by the nation that adopted the Constitution. This Part concludes that, although SSA's administration essentially conforms with the formal constitutional and statutory criteria necessary to its validity in a positivistic sense, it fails to conform to the transcendent, fundamental and legitimating principles underlying our representative democracy. Part V proposes that SSA initiate negotiated rulemaking proceedings to develop standards and procedures for the representative payee program. This Part argues that the resulting rules will gain legitimacy through the representative, participatory process by which the agency declares them to be law.

II. SSA's Representative Payee Program

The Social Security Act (the Act) provides both insurance benefits and assistance payments to over forty million Americans.[12] The Act gives the Secretary of Health and Human Services (the Secretary) broad discretion to make either direct payment or representative payment to legally competent and legally incompetent Title II beneficiaries of old age, survivors and disability insurance or Title XVI recipients under the Supplemental Security Income (SSI) program when the Sec-

12. *See infra* note 14. Title II of the Social Security Act provides insurance benefits to the aged, the disabled and their dependents and survivors who have purchased it through mandatory payroll deductions during their working years. *See generally* House Comm. on Ways and Means, 101st Cong., 1st Sess., Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means, 3-8, 41-59 (Comm. Print 1989) [hereinafter Background Material].

Supplemental Security Income (SSI) is provided through Title XVI of the Act to some of the nation's needy persons. Background Material, *supra* at 671-673. In order to become eligible, a person must be 65 years of age or older, or be blind or disabled and have an income and resources below certain benefit standards.

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 or she qualifies for old age income assistance payments under SSI. All but eight states and jurisdictions supplement the federal benefit standard to establish a combined state-federal standard against which eligibility is measured.

retary determines that the "interest of the beneficiary would be served thereby."[13]

About four and a half million beneficiaries, one out of ten social security beneficiaries, receive their benefits through a representative payee.[14] Their benefit payments constitute about 10% of all social security benefits—more than $20 billion annually.[15] Of the adult beneficiaries who have representative payees a quarter are aged, more than half receive insurance payments under Title II, and a third are institutionalized in nursing homes or custodial facilities.[16] Although most payees are apparently relatives or friends, about a quarter of all adult beneficiaries receiving representative payment have an institution or public official serving as their payee.[17] Only a small portion of the adult beneficiaries determined by SSA to be incapable of handling their own

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13. 42 U.S.C.A. §§ 405(j) (West 1991), 1383(a)(2)(A) (West 1992). 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. 42 U.S.C.A. § 1383(a)(2)(A) (West 1992).

14. 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 who received old age assistance and 3.1 million who received assistance to the blind and disabled under the SSI program. Thus a total of 43.6 million people who received benefits from the SSA in 1989. 1989 S.S.A. ANN. REP. TO CONGRESS 28-31.

15. *See* 1990 S.S.A. ANN. REP. TO CONGRESS 23-26.

16. S.S.A., *Beneficiaries With Representative Payees—12/88* (Aug. 1989) [hereinafter *Beneficiaries With Representative Payees*] (on file at the *Cardozo Law Review*). Thirty-nine percent of all adult Title II beneficiaries with representative payees are institutionalized, and 34% of SSI beneficiaries with representative payees are institutionalized. *Id.* In 1989, 8.5% of the persons receiving insurance benefits were paid through representative payees, as were 26% of all SSI beneficiaries. *See* 1990 ANN. REP., *supra* note 15, at 23-27. In 1988, of the 38.6 million people receiving Title II benefits, approximately 8.73% were in representative payment. Of these, approximately one-third are adults and two-thirds are children under 18 years old. Of the 4.1 million receiving SSI payments in 1988, approximately 32.6% were in representative payment. Of these, approximately two-thirds are adults and one-third are children, excluding those who are also receiving benefits under Title II. *See* 1989 ANN. REP., *supra* note 14, at 28-32; *Beneficiaries With Representative Payees*, *supra*. In 1985, women over 65 years old represented over 25% of all adult Title II beneficiaries with representative payees. *Id.* However, older women and older adults do not constitute as large a portion of SSI beneficiaries for whom representative payees have been appointed. In 1987, 13% were over 65 years old. HOUSE SELECT COMM. ON AGING, 101 Cong., 2d Sess., SURROGATE DECISIONMAKING FOR ADULTS: MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES, ONE-5, n.14 (Comm. Print 1988) [hereinafter SURROGATE DECISIONMAKING].

17. *See generally* S.S.A., OFF. OF RES. AND STAT., SSI REPRESENTATIVE PAYEE MI LISTING (1989). 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.

affairs have been determined legally incompetent in a state court proceeding and thus have a court-appointed guardian or conservator.[18] These figures represent a significant increase in the use of representative payment in the last ten years, an increase that is likely to continue as the population ages.[19]

Although, Congress has never established fundamental goals for representative payment, it has granted SSA broad discretion to appoint payees.[20] SSA has circumscribed its own discretion by indicating that it will certify representative payment when, due to mental or physical condition or minority, a beneficiary is unable to manage social security benefits.[21] SSA has also adopted several rationales for finding that a beneficiary is incapable and would be best served by representative payment.[22] Even though the Act authorizes the Secretary to make direct or representative payment regardless of the legal competence or incompetence of the beneficiary, the Secretary has issued regulations

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18. Of the 1.9 million adult beneficiaries reported by 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. *Id.*

19. *See generally* John A. Talbott, *A Special Population: The Elderly Deinstitutionalized Chronically Mentally Ill Population*, 55 PSYCHIATRIC Q. 90 (1983) and WINSOR C. SCHMIDT ET AL., PUBLIC GUARDIANSHIP AND THE ELDERLY 7-23 (1982). The portion of Title II adult beneficiaries determined incapable of managing their affairs increased from 2.93% 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 16, at ONE-5. Although the population as a whole increased 11% in the 1970s, the over 65 population increased 28%, to almost 30 million people or 12% of the present population. It is estimated that by 2050, the over 65 population will comprise 22% of the population or 67 million people. U.S. SENATE SPECIAL COMM. ON AGING, AGING AMERICA, TRENDS AND PROJECTIONS 7 (1991). In addition, the portion of the elderly who are 85 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.*

Furthermore, nursing homes increasingly condition admission on the imposition of a guardianship or other surrogate decisionmaking arrangement such as the appointment of a trustee, representative payee or attorney-in-fact or guardian, so that nursing homes can deal directly with family members or financial institutions rather than their residents. *See Surrogate Decisionmaking*, *supra* note 16, at ONE-15, ONE-16.

20. *See supra* note 1.

21. 20 C.F.R. §§ 404.2001-.2065, §§ 416.601-.665 (1990).

22. See Farrell, *supra* note 8, at 23-46; Farrell, *supra* note 4. In addition to regulations, SSA has articulated its policy with regard to the withholding control over entitlements in its Program Operating Manual System ("POMS"). POMS 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 SSA considers its POMS to consist of interpretative rules and general statements of policy, and thus exempt from APA rulemaking requirements, the instructions concerning representative payment contained in the POMS are not promulgated after public notice and opportunity for comment.

that require payment to a representative payee for most adults determined incompetent by a state court and for most children.[23] In addition, representative payment may be ordered if a physician or other health care professional believes that a beneficiary is incapable of managing his or her financial affairs.[24] Finally, in the absence of a state incompetency adjudication or a medical opinion, an SSA claims representative, usually a mid-level civil service journeyman, may make an incapability determination based on lay evidence and information from the beneficiary.[25]

SSA has adopted procedures that generally parallel those used to determine eligibility for the cash payment programs, despite the fact that representative payment implicates individual liberty interests and the receipt of social services rather than monetary benefits.[26] Nevertheless, only *after* a claims representative has determined that a beneficiary is incapable of managing his or her benefits and *after* a payee has been selected does SSA give the beneficiary "advance notice" of its

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23. 20 C.F.R. § 404.2015 (1991). When evidence of a state incompetency or guardianship determination is presented, SSA will issue benefits through a representative payee who may or may not be the legal guardian. S.S.A., U.S. DEPT. HEALTH AND HUM. SERV., PROGRAM OPERATIONS MANUAL § GN 00502.110B.2 (1989) [hereinafter POMS]. However, a Social Security Ruling has provided that if there is no qualified payee, including a legal guardian, and the beneficiary needs benefits for the necessities of life, SSA *may* make direct payment to a person determined legally incompetent. Soc. Sec. Rul. 62-46 (1962). While SSA may be consistent in its use of state judicial determinations of incompetency as conclusive evidence of incapability to manage social security benefits, state law standards for the imposition of a guardian of the person or a conservator of the property vary greatly. *See generally* BRAKEL ET AL., *supra* note 10, at 369-434.

24. POMS § GN 00502.050A-.050B (1989).

Instead of establishing functional criteria for determinations of "incapability," POMS specifies the kind of evidence upon which a determination of incapability may be based. This evidence includes an SSA finding of disability for entitlement purposes such as Down's Syndrome or severe mental retardation. In addition, conditions specified in SSA's Medical Disability Listings, a determination of incapability by the VA, and a physician's or psychologist's opinion regarding capability are considered "convincing evidence" upon which a determination of capability or incapability must be based. SSA claims representatives are "always" to obtain convincing medical evidence of incapability if it is available and are to seek it first from the beneficiary's personal treating physician or psychologist or the medical officer of a medical facility in which the beneficiary is resident. If neither are available, the beneficiary is apparently advised that he or she will need an assessment, but that SSA is not authorized to pay a fee for completion of its evaluation form, SSA-787. Payment of the fee is to be treated as a matter to be resolved between the physician and the beneficiary.

25. POMS § GN 00502.020B (1991); 00502.030A.1 (1991). If a beneficiary has difficulty in answering questions, securing evidence and reporting instructions, claims representatives are asked, "do you think this difficulty indicates the beneficiary cannot manage or direct management of funds?" POMS § GN 00502.020A (1991).

26. For a fuller discussion of SSA procedures discussed in this paragraph see Farrell, *supra* note 4.

determination and provide the beneficiary a period within which to review the evidence, provide additional evidence and "protest" the determination before it is implemented.[27] If the incapability determination is confirmed by a claims representative after protest, it is regarded as an "initial determination," is implemented immediately and the beneficiary then receives a "formal notice" of the action.[28] The beneficiary may request "reconsideration" by the claims representative[29] and may request de novo review of that determination by an administrative law judge (ALJ),[30] with a right to an administrative appeal to the SSA Appeals Council[31] and a judicial review pursuant to provisions of the Act.[32] Unlike state guardianship proceedings, which use common adversarial procedures to place the persuasion and production burdens on the moving party who seeks to limit the autonomy of the proposed

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27. 20 C.F.R. §§ 404.2030(a), 416.630; POMS § GN 00502.310, A (1989). *But see* POMS § GN 00502.310B (1989). "The notice may be sent only after incapability has been established and a proposed RP has been chosen." The notice does not provide a statement of the reasons why the decision has been made to appoint a payee except to state that "the facts we have showed that this would be best for you." S.S.A. DEPT. HEALTH AND HUM. SERV., Notice of Planned Action (Landover, MD 20785, December 15, 1990) [hereinafter Planned Action] (on file with the *University of Pittsburgh Law Review*).

28. POMS §§ GN 00502.400, GN 00502.600, GN 00502.400A.1-2 (1991). The OBRA 1990 amendments require SSA to provide written notice of initial determination before implementation. In addition, SSA must provide hearings to the same extent as is provided in subsection (b) of section 405. Since § 405(b) requires that beneficiary be sent a notice containing a statement of the case, a discussion of the evidence, and the reasons upon which the determination is based, SSA must revise its current practices and provide more informative formal notice of initial determinations. 42 U.S.C.A. §§ 405(b), (j) (West 1991).

29. 20 C.F.R. §§ 404.903(c)-.416.1403(c) (1991). Reconsideration consists of a review of the written file and basis for the original decision by a new claims representative. Occasionally, a supervisor of one of the claims representatives involved in earlier decisions will participate in the reconsideration review. New evidence may be, but seldom is, submitted at this stage. It is unusual for a beneficiary to appear in person to submit information upon a reconsideration review.

30. 42 U.S.C.A. §§ 405(b)(1) (West 1991), 1383(c)(1) (West 1992); 20 C.F.R. §§ 404.929-.965, 416.1429-.1465 (1991). There are about 700 ALJs conducting SSA hearings in 132 offices around the country. Koch & Koplow, *supra* note 9, at 223 n.136. 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. APA standards and procedural requirements are not required by statute to be applied in SSA proceedings, but have been incorporated into most SSA practices. *Id.* and see DONNA PRICE COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATIVE HEARING PROCESS 66-70 (1985).

31. 20 C.F.R. §§ 404.970, 416.1470 (1990); *see* Koch & Kaplow, *supra* note 9, at 224. Council decisions are not considered precedential and therefore its decision cannot provide a standard of capability through adjudicative lawmaking.

32. 42 U.S.C.A. §§ 405(g), (h).

ward, until recently, SSA procedures failed expressly to allocate the risk of adjudicative error to protect liberty interests.[33]

Sometimes beneficiaries, determined by SSA to be incapable of managing their affairs, can find no suitable payees to manage their benefits. Until recently, SSA has often suspended the payment of benefits to such beneficiaries altogether for up to ninety days or until payees were found,[34] and then made lump sum payments of the back benefits to which the beneficiaries were entitled.[35] Effective in 1991, SSA is prohibited by Congress from suspending benefits for more than thirty days except in the case of Title XVI drug and alcohol abuses, legal incompetents and minors, whose benefits may be suspended indefinitely until a suitable payee can be found.[36] All payees are required to account to SSA annually by filing a one page form indicating whether they have expended funds in the beneficiary's interest.[37] Payees who

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33. Although neither the Social Security Act nor SSA regulations expressly allocate the burden of proving capability or incapability, the POMS now seems to place the risk of non-persuasion on the moving party. POMS § GN 00502.020 (1991).

34. In the 1990 OBRA amendments, Congress amended the Social Security Act to permit SSA to suspend benefits for up to 30 days when no suitable payee can be found and payment would result in substantial harm to the beneficiary. 42 U.S.C.A. § 405(j)(2)(D) (West 1991). *See* POMS § GN 00504.100A.2.a (1991). Prior to the amendment, SSA suspended benefits without statutory authority. Briggs v. Sullivan, 886 F.2d 1132, 1144 (9th Cir. 1989). POMS sections 00504.100, 00504.200 and 00504.205 (1991). After 30 days from the date the award is certified, or in post-entitlement cases, from the date benefits are suspended, direct payment will be made unless the beneficiary is: (1) legally incompetent; or (2) under age 15; or (3) for SSI benefits, a drug addict and/or alcoholic (DA/A). POMS §§ GN 00504.100A.2.b, 00504.200B (1991). In these three instances, benefits will be withheld until a representative payee can be appointed. *Id.* SSA does not afford beneficiaries either notice of a proposed suspension of benefits because of the absence of a payee or an opportunity to be heard before payments are withheld. Beneficiaries are sent a notice by SSA informing them that "We have suspended your benefits because we have not been able to locate any person or organization who is willing and suitable to receive and apply these benefits for your use." POMS § GN 00504.220D (1991). A suspension of benefits for failure to locate a suitable payee is an "initial determination" subject to appeal and a protest of the decision is to be treated as a request for reconsideration of that determination. POMS §§ GN 00502.410A.1.d, .420B.3 (1991). Thus, unlike determinations of the need for a payee, the determination to suspend benefits is implemented before the beneficiary is notified of the determination, although the suspension of benefits is itself considered to be an initial determination by SSA subject to the formal appeals process, POMS § GN 00504.220 (1991). It is unlikely that a full appeal could be prosecuted within the 30 day period during which payments may be suspended.

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 Appeals Council—the court in the *Briggs* case 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).

35. *See Briggs*, 886 F.2d at 1141, 1145.

36. 42 U.S.C.A. § 405(j) (West 1991); 42 U.S.C.A. § 1383(a)(2) (West 1992).

37. Jordan v. Bowen, 808 F.2d 733 (10th Cir. 1987).

are found by SSA to have misused benefits may not appeal its finding but are only infrequently required to pay restitution to the beneficiary or prosecuted criminally.[38] Similarly, beneficiaries may not appeal a finding by SSA that their benefits have been misused by their payees.[39] However, where SSA believes that the Agency has been negligent in investigating or appointing a payee, it will repay misused funds to the beneficiary or a subsequently appointed payee.[40] This determination of agency responsibility is also unappealable.[41]

These procedures have been criticized as neither conforming to a "legal justice model" designed to protect individual autonomy interests or a "therapeutic justice model" designed to assure the provision of needed assistance.[42] SSA procedures fail to conform to the legal justice model in several important ways. First, SSA has failed to establish a standard of incapability that would provide consistency in determinations made by physicians and SSA personnel and in its notice to beneficiaries of behavior likely to be regarded as incapability. This lack of a

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38. *See POMS §GN 00502.310 (1989).*

39. Misuse determinations are not designated "initial determinations" and SSA guidelines provide that misuse determinations may not be appealed. POMS § GN 00502.410B (1991). The denial of opportunity for administrative review of misuse determinations have been held not to violate due process requirements. Jordan v. Schweiker, No. CIV.-79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, Courts file). ACUS recommended to the SSA that both beneficiary and the payee be permitted to appeal misuse determinations. SSA Representative Payee Program, 56 Fed. Reg. 33847, 33849, recommendation 5 (codified at 1 C.F.R. § 305.91-3) [hereinafter Payee Program].

40. Holt v. Bowen, 712 F. Supp. 813, 818 (D. Colo. 1989). *But see* POMS § GN 00604.070 (1989).

41. Farrell, *supra* note 4.

42. Farrell, *supra* note 4. The legal justice model is premised on the proposition that an adversarial procedure for truth-finding, and the presentation of reasoned argument about the application of law to facts, is the most acceptable means of settling of disputes. Constitutional due process has been construed through case-by-case adjudication, to embody certain attributes of the model depending on the interests at stake. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Mathews v. Eldridge, 424 U.S. 319 (1976). Some attributes of the model are a right to notice of the matter in dispute; an opportunity to be heard, present testimony and other evidence, and to confront adverse witnesses; a reasoned decision by a neutral decisionmaker; and sometimes an appeal. *See, e.g.*, Brewer v. Morrissey, 408 U.S. 471 (1972). See also *infra* notes 117-67. 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 them. Thus, if autonomy is valued more highly than beneficence, a legal model of adversarial justice will protect that interest when it is implicated by state paternalism.

The therapeutic justice model is premised on the notion that those who have the ability to provide assistance to others in need have a duty to provide it. This duty remains even though assistance may not be sought nor voluntarily accepted. Rather than adversarial procedures, this model of justice relies on expertise, objective fact finding, unreviewed professional judgments and fiduciary responsibility. *See infra* note 168.

standard is especially problematic in the representative payee system where incapability determinations are made by a multitude of private physicians, psychologists, SSA claims representatives and ALJs without guidance from the Act, SSA regulations or precedential rulings from the SSA Appeals Council. The great range of determinations rendered without a standard approach the purely arbitrary.[43] Second, SSA fails to provide beneficiaries notice and an opportunity to be heard *before* they are determined to be incapable of managing their affairs. Although not necessarily a violation of due process, such disregard for the information that beneficiaries can provide about their own lives and the disrespect it shows them is not conducive to the preservation of autonomy for which the legal model strives.[44] Further, although SSA provides beneficiaries a number of post-determination appeals, many SSA procedures, such as reconsideration, are redundant; present practical obstacles to uneducated, infirm and elderly beneficiaries who wish to challenge SSA; and fail to afford beneficiaries a meaningful opportunity to participate in the decision about their competence until it has been solidified by agency inertia.[45]

Despite the fact that SSA procedures do not conform to a legal justice model and fail fully to protect liberty and autonomy interests, neither do they further the interests of beneficiaries and the public in the provision of needed assistance. Another federal agency with similar authority to make benefit payments to a representative payee, the Department of Veterans Affairs (VA), has adopted the therapeutic justice model.[46] This model relies on professional expertise to diagnose incapability as an empirical fact, provides rehabilitation and remediation on a non-voluntary basis, and is based on the premise that, if competent, beneficiaries would be grateful.[47] Although VA procedures deviate

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43. See Farrell, *supra* note 4. ACUS has recommended that SSA promulgate through rulemaking a detailed standard of capability. Payee Program, *supra* note 39.

44. *See generally* JERRY L. MASHAW, DUE PROCESS IN PROCESS IN THE ADMINISTRATIVE STATE (1985).

45. Farrell, *supra* note 8, at 48-49; Payee Program, *supra* note 39. In the Payee Program, *id.*, ACUS recommended that SSA develop a standard for a minimum amount of evidence necessary to trigger the initiation of payee proceedings. *Id.* recommendation 1.b. SSA does not inform objecting beneficiaries that they may be assisted in an appeal of agency action by professional or lay advisors nor does it provide them with a list of legal services attorneys and others in the community upon whom they might call for help. *See id.* recommendation 2(a)(vi).

46. The VA's representative payment authority is found in 38 U.S.C. §§ 3202-04 (1990); 38 C.F.R. §§ 13.1-13.11 (1987).

47. Farrell, *supra* note 4; KITTRIE, *supra* note 11; RALPH RWISNER & CHRISTOPHER SLOBOGIN, LAW AND THE MENTAL HEALTH SYSTEM 599-612 (1990); Mashaw, *supra* note 44.

from the legal justice model in significant ways, they do provide greater assurance that vulnerable veterans will receive the individual assistance that justifies state intervention in their affairs.

SSA's procedures are not based on these therapeutic premises and do not assure the provision of needed managerial services to incapable beneficiaries. In many instances, lay persons, including civil service claims representatives and ALJs, not experts, make incapability determinations without medical or psychological information.[48] No effort is made to find beneficiaries in need of help, and indeed, SSA will not certify representative payment at a beneficiary's request unless he or she is found incapable by SSA.[49] In addition, no effort is made to rehabilitate SSA beneficiaries through representative payment.[50] The services SSA provides—payment to a payee—are not intended to teach management skills or to restore or promote self sufficiency.[51] Most aggrieviously, when a payee is found to be needed, but none is available, SSA will stop payment of benefits altogether, in some cases until a payee can be found.[52] Finally, SSA's efforts to monitor and supervise payee performance, so as to assure needed services, are ineffective. Until required by Congress or the courts to do so, SSA has generally failed to investigate the integrity and qualifications of proposed pay-

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48. In contrast, VA incompetency hearings are held by a "rating board" with at least one physician member. This board does not conduct an adversarial evidentiary hearing, but takes an active role in developing factual evidence and making an expert determination. Thus, the Board may order VA physicians to perform standardized tests to aid in their incompetency determinations. Farrell, *supra* note 8, at 19.

49. POMS § GN 00502.040B.4 (1989).

50. Some private, non-profit organizations such as one in Milwaukee, Wisconsin, offer a wide array of supportive services to low income residents designed to establish capability if possible, including education and supervision regarding budgeting, paying bills, money management and dealings with landlords, employers, and creditors as part of independent living programs. The program also provides volunteer representative payee and agency payee services when they are needed. MARCIA HITZ GRAFF, MONEY MANAGEMENT: A CONTINUUM OF SERVICES L19. SSA has not contracted with such agencies when payees are not available to serve needy beneficiaries or supported their efforts. Farrell, *supra* note 8, at app. II.

51. The VA itself will assist veterans 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. 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. Thus they will maintain and audit accounts received from fiduciaries and determine the appropriateness and legality of investments. VA Manual, PG27-2, para. 3.01 (1981). After considering a list of factors relevant to the likelihood of misfeasance, VA estate analysts may order fiduciaries to provide surety bonds for the faithful performance of their duties. VA Manual, 27-1, para. 8.23 (1987). SSA has undertaken none of these functions.

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

ees,[53] failed adequately to monitor payee performance through annual accountings,[54] failed to provide or itself act as a payee when no other party is available,[55] failed to permit either beneficiaries or payees to appeal findings of misuse,[56] and failed aggressively to seek restitution of funds misappropriated by payees or explore ways to insure such losses.[57]

III. THE PROBLEM OF LEGITIMACY

Having concluded that SSA's representative payee program does not effectuate either of the values put in tension by paternalism—autonomy or beneficence—through the adoption of a legal justice model or a therapeutic justice model, we might recommend reform of SSA procedures to protect fully one or the other of the interests served by the models.[58] However, such an effort could only proceed from our own substantive value preferences and the significance we would attach to facts about the functional characteristics of persons receiving social security benefits. Rather than undertake such a policy analysis here,

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53. Holt v. Bowen, 712 F. Supp. 813, 818 (D. Colo. 1989). In 1984 and again in 1990, Congress imposed investigation responsibilities upon SSA. 42 U.S.C. §§ 405(j)(2) and 1383(a)(2)(B) (1991).

54. Jordan v. Heckler, 744 F.2d 1397, 1399 (10th Cir. 1984); Jordan v. Bowen, 808 F.2d 733 (10th Cir. 1987). These two circuit court opinions deal with different district court orders in the same case which held that due process requires SSA to conduct universal annual accounting of representative payees.

55. In *Briggs v. Sullivan*, the court refused to find that SSA had violated a duty to find payees for drug and alcohol abusers receiving SSI where the agency had used reasonable efforts to do so. 886 F.2d 1132 (9th Cir. 1989). Nevertheless, Congress has given SSA new authority to pay fees on a limited basis to certain qualifying organizations out of the benefits they administer. 42 U.S.C.A. § 405(j)(4)(A), (B), (C) (West 1991). The ability of nonprofit organizations to charge a fee for providing payee services may increase the number of available payees.

56. POMS § GN 00604.080B (1989).

57. POMS § GN 00604.080 (1989). SSA considers payees who misuse funds indebted to the beneficiary. SSA will demand restitution unless the payee is unable to make repayment, cannot be found or prosecution is not in the beneficiary's best interest. *Id.* Although SSA can refer cases in which restitution is owed to the U.S. Attorney for prosecution, only 9 cases were referred in 1989 out of about 500 cases of misuse. 1989 ANN. REP., *supra* note 14, at 32.

Both guardianship and the VA fiduciary program provide some mechanism for insuring the loss of funds due to malfeasance by the guardian or fiduciary. Most states require guardians to post fidelity bonds and VA estate analysts have authority to require them from fiduciaries who may be likely to misuse funds. SSA has taken no steps to provide such underwriting. The Administrative Conference of the United States recently recommended that it do so. Payee Program, 56 Fed. Reg. 33,847, Recommendation 8 (1991).

58. Recommendations for specific procedural reforms have been made by the author elsewhere. Farrell, *supra* note 8; Farrell, *supra* note 4; *see also* Payee Program, *supra* note 43, recommendations.

this article will explore the basis upon which it can be claimed that SSA's selection of values should be given preference over others. SSA's uncertainty about its mission in providing representative payee services, which is reflected in its procedures, raises questions about who should choose between the competing policies of paternalism and why SSA's determinations should be credited. If we believe that the standards and procedures used by SSA to shape a beneficiary's right to control her benefits reflect a "legitimate" choice between conflicting values, they should be respected as law. By legitimate, I mean supported by a generally agreed upon reason for permitting government intrusions into the affairs of others, apart from their positivistic validity.[59]

Prevailing theories about the legitimacy of government action reflect fundamental concepts about the nature of law. To oversimplify the matter, these concepts can be of two types. Legal positivists conceive of law as the declaration (by enactment or enunciation) of rules by those with political authority to make them: courts, legislatures and agencies.[60] Thus for the positivist, the question of what the law is, is a determinate one: the law consists of rules that meet a finite set of formal criteria that identify the manner in which authoritative institutions can declare such rules or other standards.[61] While positivists must thus recognize as law rules believed to be immoral and unjust, they may urge reform of the law so that it will embody moral tenents outside of the law.[62] In contrast to the positivists, those adhering to transcendent theories of law hold that a rule need not be respected as law unless it embodies certain unwritten moral principles.[63] Thus, judicial holdings

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59. Such norms and principles are proposed by various schools of jurisprudence, are drawn from larger philosophical and epistemological systems outside the law, in this case, political theory.

60. In this sense, law is more than a statement, it is an authoritative declaration, the performance of an act to which certain consequences attach. A court thus declares the existence of a contract and by doing so entitles the litigant seeking to enforce a promise to certain remedies provided through the state's power. See George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 974 (1981); H.L.A. HART, THE CONCEPT OF LAW (1961); THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (J. Cropsey ed., 1971) (1st ed. London 1981) ("It is not Wisdom, but Authority that makes a Law. . . . [N]one can make a Law but he that hath the Legislative Power.").

61. R.M. DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977).

62. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 (1958); Fletcher, *supra* note 60, at 976.

63. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 655-69 (1958) (legislation must conform to certain principles of morality before it can be classified as law in this sense). Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 847 (1935).

are not declarations of law but assertions about conformance of the courts' rules with a body of law and principles that transcend enacted rules.[64] These theorists, then, do not urge law reform but seek legitimate rules: rules which reflect assertions about law that is neither enacted by legislatures, agencies or courts, such as principles of substantive due process or natural law. In this article, I use legitimate to mean lawful in the transcendent, not positivistic sense. However, I maintain that legitimacy depends not on the substantive content of rules, but upon whether the *process* by which the rules are promulgated conforms with or embodies certain transcendent principles regarded as fundamental in a representative democracy.[65]

There would seem to be little dispute that SSA rules and adjudicatory determinations which govern the representative payee program have been promulgated in accordance with constitutional and statutory requirements. That is, SSA rules and determinations are positive law because they are declarations made by an agency authorized by the Constitution and the Act to make them.[66] Because they conform to these formal criteria, SSA procedural rules and determinations are law in the positivistic sense. It is possible to critique the positive law SSA has made with regard to representative payment as "bad" because it fails to embody, as a substantive matter, transcendent moral principles of either autonomy or beneficence. However, my critique is about the legitimacy of the *process* by which SSA has made law rather than the substance of the law. I recognize the positivistic validity of the process by which SSA has made law reflected in its compliance with constitutional due process requirements and Administrative Procedure Act (APA)[67] procedures for rulemaking and adjudication, but I question its legitimacy because of the failure of SSA to promulgate its rules in conformity with external, transcendent political and moral process principles: the consensual and participatory values that underlie American political and constitutional theory.[68] I find that SSA rules lack legiti-

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64. *See, e.g.*, DWORKIN, *supra* note 61, at 17; Fletcher, *supra* note 60, at 977-79.

65. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. L. REV. 761, 762 (1989) (American political theory, "premised on basic notions of representational democracy, focuses the issue of political legitimacy primarily on *who* is to make fundamental policy judgments, rather than on what those decisions ultimately are.").

66. *See* discussion *infra* notes 83-95, 99-100; Farrell, *supra* note 8, at 35-46, 61-76.

67. Farrell, *supra* note 8, at 39-45, 61-77.

68. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9 (1982); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 10 (1956). *See* JOHN H. ELY, DEMOC-

macy in this sense and urge that the procedure by which SSA makes policy determinations be reformed to embody certain fundamental, unwritten procedural principles.

The basis for a claim that SSA's present choice, or its failure to make a choice, between conflicting values in its present rules governing representative payment should be respected as legitimate in the transcendent sense is not clear. There are several possible bases for such a claim. SSA might claim that its choices are legitimate because they follow the directives of a democratically elected legislature;[69] that SSA rules and adjudications are not policy choices at all but determinations dictated by objective expertise upon which the legislature has chosen to rely;[70] that SSA is accountable to the electorate through a democratically selected President;[71] or that the compliance of its rules and procedures with constitutional requirements indicates their adherence to substantive values expressed in the Constitution adopted by representatives of the people and accepted as fundamental.[72] I contend that none of these claims can be supported in the case of SSA's representative payment program, and that legitimacy must be provided, if it can be at all, on some other basis.

A. The Lack of Statutory Directives: The Purposes of Representative Payment Authority

If SSA's adoption of the legal justice or therapeutic justice models were directed by Congress, SSA's discretion could be justified as an expression of popular will channeled through a democratically elected, representative legislature.[73] As demonstrated below, however, in the case of SSA's representative payee program, Congress has provided SSA little or no guidance as to which of several possible legislative purposes the agency is meant to pursue or what procedures it might

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RACY AND DISTRUST 87 (1980) for exposition of the argument that the Constitution consists largely of specific normative principles regarding how adjudications and legislative enactments are to be made, and that these foster broader process values. *See also* infra note 231.

69. James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L REV. 1041 (1975). *See* discussion *infra* notes 73-95.

70. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23-24 (1938). *But see* WALTER GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINT 19-22 (1956). *See also infra* notes 96-109.

71. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See discussion *infra* note 110.

72. See discussion *infra* notes 117-88.

73. Richard B. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

choose to accomplish them. Furthermore, by making a broad delegation of discretionary authority to SSA, Congress may have intended to pass the hard decisions to faceless bureaucrats who need not stand for reelection and thus are *not* accountable to the electorate.[74]

There are at least three possible legislative policies that the 1939 authorization for representative payment could have been intended to further, and which therefore could circumscribe, the Secretary's discretionary authority to find that representative payment serves the "interests of any individual."[75] These policies include congressional intention to serve the interests of beneficiaries as they are determined by payees, as they are determined by the Secretary, or as they would have been determined by the beneficiaries if they were competent. However, SSA is given no indication by Congress which should control its discretion.

First, Congress may have wanted to assist beneficiaries who needed help managing their benefits by providing a legal mechanism through which decisions about the wise expenditure of federal funds could be made. The appointment of representative payees can be viewed as a way of maintaining decentralized decisionmaking with regard to benefit expenditure in that each payee is empowered to determine the best expenditure of benefits on behalf of the incapable beneficiary in his or her particular circumstances. As such, representative payment merely provides the technical means to permit family members or others to decide what expenditure of benefits best serves the needs of incapable beneficiaries.

However, the Secretary is authorized to certify representative payment only in accordance with the Secretary's own determination of the beneficiary's interest.[76] This authorization could indicate a second, separate intention on the part of Congress to benefit and protect only the interests of the beneficiary that the Secretary decides are worthy of protection; not necessarily the beneficiary's interests as the beneficiary, a state court or a representative payee might perceive them. Viewed in this light, representative payment provides a mechanism for centralized government decisionmaking with regard to benefit expenditure enforced through standards for payee selection and performance. Furthermore,

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74. Freedman, *supra* note 69, at 1054-55. Ely, *supra* note 68, at 131-134; Stewart, *supra* note 73, at 1695 (broad delegations of unguided authority to administrative agencies threatens the legitimacy of agency action because major policy questions are decided by unaccountable officials).

75. 42 U.S.C.A. §§ 405(j)(1) (West 1991), 1383(a)(2) (West 1992).

76. *Id.*

since it did not require the Secretary to act in accordance with state adjudications of competency, Congress may have sought to ensure a uniform federal policy establishing outer limits for the expenditure of social security benefits.[77] Such a uniform federal policy would assure federal taxpayers that the funds they provide to old, disabled and poor people will be used to provide things of which the public would approve—food and clothes rather than alcohol and games of chance—much as Congress has done by establishing in-kind benefit programs, such as Medicaid and public housing.[78]

Although there is little evidence of it, a third congressional motivation could have been to empower the Secretary to appoint a payee to expend federal benefits out of deference to the rights of beneficiaries. When persons are recognized to have substantive liberty and property interests, such as entitlements to social insurance and welfare benefits, the Constitution protects them against deprivation without due process.[79] In some circumstances courts have held that due process requires surrogate decisionmakers to make dispositions for incompetents, not in accordance with the best interests of the incompetent as is determined by others, but to the extent possible, in accordance with the

77. 42 U.S.C. § 405(k) (1988) immunizes the Secretary from liability for paying benefits to persons adjudicated incompetent by providing that direct payment to a legally incompetent person pursuant to the authority granted by subsection 405(j) shall be complete satisfaction of the Secretary's obligation to make payment. In addition, payment made to a legally incompetent person prior to December 31, 1939 and any payment made after December 31, 1939 to an incompetent person where the Secretary has no knowledge of the incompetency prior to certification of payment are to be considered complete settlement and satisfaction of any claim to payment. *Id.* The negative implication of the section would seem to be that if after December 31, 1939, payment is made to a person known by the Secretary to be legally incompetent or not pursuant to § 405(j), payment will not be a complete settlement and satisfaction of any claim to payment. Thus, § 405(k) would prevent the estate of an incompetent suing the Secretary to recover payments made to a legally incompetent beneficiary rather than his or her guardian. While Congress may have intended to protect the public purse against such claims, the provision also protects federal prerogatives with regard to the appropriateness of making direct payments to legally competent and incompetent beneficiaries, rather than abdicate such prerogatives to the states.

78. At least one federal court has acknowledged this justification for representative payment. The Court of Appeals noted in *Briggs v. Sullivan* that the district court found that the public interest in wisely spending public funds outweighed the incapable beneficiary plaintiffs' interest in direct payment of benefits to avoid the hardships occasioned by SSA's suspension of benefits where no payee could be found. 886 F.2d 1132, 1145-46 (9th Cir. 1989). The Court of Appeals did not agree. If the only goal were to provide assistance to beneficiaries, the Secretary might be thought required to provide payees to those beneficiaries who request them. However, SSA guidelines make it clear that it will not provide a payee to a competent adult beneficiary simply because the beneficiary desires one. *See* POMS § GN 00502.020A.1 (1991).

79. Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976); Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

judgment the incompetent would have made if competent.[80] This principle suggests that the source of rights exercised by guardians is not the *parens patriae* powers of the state alone, but the constitutionally protected rights of the incompetent individual whose liberty or property is at issue. Such a rationale for representative payment would support broad powers for representative payees and the establishment of procedures through which substituted judgments might be rendered.

Perhaps related to the effectuation of beneficiary rights is Congress' possible intention to facilitate the expenditure of social security benefits by eliminating defenses to the enforcement of contractual relations based on questions of competence. Contracts have long been held voidable by a party who is determined not to have had the mental capacity to enter the relationship voluntarily, either because he or she could not understand the nature of the transaction or could not act in accordance with that understanding.[81] Nursing homes, landlords, merchants and others who deal with social security beneficiaries run the risk that such defenses will be raised against enforcement of their transactions. Representative payment reduces this risk by assuring those who deal with social security beneficiaries, that beneficiaries determined by SSA to be incapable of managing their benefits will be precluded from engaging in contractual relationships for their expenditure. If this purpose were among those that representative payment was intended to serve, the test of capability should reflect the purposes served by concepts of capacity to contract or the assurance of free assent, rather than, for instance, the assurance of minimal functional competence to secure food, shelter and clothing, or publicly approved expenditures.

Since the legislative histories of the original sections 205(j) and 1631 of the Act are silent with regard to the reasons for their enactment, it may be impossible to separate these hypothetical congressional motives and determine which purposes motivated congressional action

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80. *See, e.g., In re* Conroy, 486 A.2d 209 (N.J. 1985); *In re* Quinlan, 355 A.2d 647, 664-65 (N.J. 1976) (incompetent patient had a right to privacy grounded in part in the federal Constitution's Fourteenth Amendment to terminate medical treatment that could be exercised by a court-appointed guardian acting as surrogate decisionmaker). *See also* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1365 (2d ed. 1988).

81. E. ALLAN FARNSWORTH, CONTRACTS § 4.6 (1982); 1 SAMUEL WILLISTON, LAW OF CONTRACTS §§ 156.250-51 (revised ed. 1936). Similar rationale support the incapacity of children to enter contracts.

and should therefore guide SSA.[82] Furthermore, Congress' subsequent investigation and evaluation of certain aspects of representative payment in 1984 and 1990 focused on discrete trouble spots, largely the investigation and monitoring of payees, and did not articulate or clarify the underlying policy objectives of representative payment. Periodic congressional repairs of separate parts of the representative payment program cannot provide guidance to SSA with regard to other aspects of the program not addressed by Congress. Nor can congressional silence with regard to other aspects of the program be interpreted as ratification or approval. It should be clear that congressional silence means only that Congress has not spoken and no more.

Not only has Congress failed to indicate what purposes it intends representative payment to serve or how SSA is to carry out its unstated policies,[83] the Constitution does not require Congress to do so. The Constitution places some restraints on delegations of legislative authority to administrative agencies and prohibits vague statutory restrictions on private action and arbitrary regulation. Nevertheless, the Supreme Court has sustained legislation granting essentially unbounded administrative discretion; even if only a hypothetical rationale relevant to a legitimate legislative end is provided to support it[84] or where an agency has limited its own discretion through regulations.

The Supreme Court has not invalidated a federal statute because of an excessive delegation of legislative power to an executive agency[85] since the non-delegation principle was used to invalidate some regulatory statutes at the beginning of the New Deal period.[86] The Court

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82. Determining legislative intent is, of course, problematic, for legislation is the result of a process in which different persons, committees and chambers act with a variety of motives.

83. Since Congress may exercise only the powers enumerated in the Constitution, the representative payee program must be authorized by one of these. The Social Security program itself has been found by the Supreme Court to be an exercise of congressional authority to tax and spend public funds for the general welfare. Steward Machine v. Davis, 301 U.S. 548, 558 (1937); Helvering v. Davis, 301 U.S. 619, 640-45 (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' spending powers. *See* U.S. CONST. art. I, § 8, cl. 18.

84. Ferguson v. Skruppa, 372 U.S. 726 (1963).

85. *See generally* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982). Professor Stewart observes that the decline of the delegation doctrine was due in large measure to judicial recognition of the fact that the nature of the subject matter of regulation, such as price regulation, did not permit the establishment of detailed and enduring policy; that it was sometimes politically infeasible for Congress to make detailed policy choices itself; and that the courts were not institutionally suited to determine the degree of specificity desirable or possible with regard to certain legislative matters. Stewart, *supra* note 73, at 1680.

86. Carter v. Carter Coal Co., 298 U.S. 238, 297 (1936); Panama Refining Co. v. Ryan,

requires Congress simply to lay down some "intelligible principle" to guide the exercise of delegated authority to the executive.[87] However, the Supreme Court has given some indication that more congressional guidance in the form of a "clear statement" of legislative purpose may be required where an agency is given discretion to penalize individual activity, as opposed to discretion to regulate business.[88] SSA's determination to deprive an individual of control over social security benefits, although intended to be protective, infringes on important individual liberty interests and may thus have a sufficiently penalizing effect to require a clearer statement of congressional purpose than sections 205(j) and 1631 of the Act provide. Nevertheless, given the doctrinal weakness of the delegation principal, it is more likely that any concerns about accountable decisionmaking in the representative payment program would find expression in the application of due process prohibitions against vagueness and arbitrary agency action, and not in application of the delegation doctrine.

Due process does not permit life, liberty and property interests[89] to be diminished by operation of a statute so vague and uncertain that a

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293 U.S. 388, 433 (1935); A.L.A. Schecter Poultry Co. v. United States, 295 U.S. 495, 551 (1935).

87. National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.6 (2d ed. 1984). For a suggestion that the non-delegation principle imposes meaningful restraints on congressional delegations of authority to administrative bodies. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); Am. Textile Mfrs. Inst. Inc. v. Donovan, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting). Several lower federal courts have held some delegations of discretion to administrative bodies without legislative standards to be violations of due process. *See, e.g.*, Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964). Presently, the non-delegation principle's significance is the support it provides for narrow constructions of legislative grants of administrative authority. 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 non-delegation doctrine an unfortunate development that jeopardizes the legitimacy of administrative discretion. *See, e.g.*, J.S. Kelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972) (Book review). In other contexts such as antitrust and civil rights, an "intelligible principle" to guide agency authority may be discerned from the legislative history of the authorization. There is no such legislative history in the case of the 1939 congressional authorization. The legislative history of amendments to the 1939 authorization are focused on specific administrative problems and do not illuminate the larger purposes of indirect payment. *See supra* notes 73-82.

88. *See* SCHWARTZ, *supra* note 87, at 50 (In the field of personal rights, the standards requirement still has vitality despite the post-Panama and B. Schechter federal cases.). *Compare* Schnider v. Smith, 390 U.S. 17, 26-27 (1968) *with* Fahey v. Mallone, 332 U.S. 245 (1947). *See also* Stewart, *supra* note 73, at 1680-1681.

89. See discussion of constitutionally protected liberty and property interests, *infra* notes 117-21.

reasonable person cannot determine its meaning.[90] Thus, an impermissibly vague law may delegate "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[91] Concerns about such ad hoc, subjective judgments by claims representatives are presented by SSA determinations of the need for representative payment. The authority granted to the Secretary to deprive social security beneficiaries of the legal right to control their benefits when it is in their "interest" to do so is arguably too vague to prevent its arbitrary exercise by SSA personnel and fails to put beneficiaries on notice of the circumstances under which such action may be taken.[92] However, because SSA has limited representative payment to those who are incapable due to youth or mental or physical condition, SSA's procedures may meet the requirements of the vagueness doctrine.[93] Thus, some authorities contend that concerns about uncontrolled agency power should not be addressed through non-delegation or vagueness doctrines but through protections provided by the agency against arbitrary agency action. Professor Kenneth Culp Davis argues that courts should declare broad delegations and vague legislative directives lawful if a legislative purpose can be discerned and the agency has provided protections against arbitrary administrative power.[94] However, while administrative regulations may protect private interests against arbi-

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90. Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). *See also* Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926); TRIBE, *supra* note 80, at 684. *Cf.* Boyce Motor Lines v. United States, 342 U.S. 337 (1952).

91. Grayned v. Rockford, 408 U.S. 104, 108-109 (1972). GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1043-45 (1986).

92. Similarly vague standards of state civil commitment statutes have been upheld only because they have been found to require a finding of a mental disease or defect and a finding that the person was unable as a result of the disability to provide for his or her basic personal needs. In Estate of Chambers, 139 Cal. Rptr. 357 (Cal. Ct. App. 1977) a California court of appeals upheld a state statute which authorized the appointment of a conservator of the property of a person found to be "gravely disabled," defined as a condition in which "a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing or shelter." *Id.* at 362-63 (upholding CAL. WEL. & INST. CODE § 5008(h) (West 1969)).

93. In Morton v. Ruiz, 415 U.S. 199 (1974) (citations omitted), the Supreme Court noted that "agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with government legislation, but also to employ procedures that conform to law. No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis. . . ." *Id.* at 232. SCHWARTZ, *supra* note 87, at § 4.8.

94. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 725-730 (1969); KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE 211-14 (2d ed. 1978). For a critique of Davis' view see Wright, *supra* note 87.

trary agency action, they cannot legitimate themselves simply by being rationally related to a policy which, if chosen by the legislature, would be within its constitutional authority to pursue. It is the legitimacy of the agency's authority to make the basic policy choice that we are concerned about here. The agency making the choice cannot provide its own legitimacy in the absence of legislative action.[95]

B. The Lack of Administrative Expertise

Some agency determinations are regarded as legitimate because Congress is seen as having delegated to the agency not the authority to make substantive policy judgments, but only the responsibility for mak-

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95. The standard chosen by SSA for the exercise of its discretion must be accepted by reviewing courts as congressionally intended unless it is arbitrary. Under the Supreme Court's *Chevron* doctrine, judicial review of SSA's "incapability" regulations is limited to a determination of whether the regulations are authorized by Congress and are not arbitrary or capricious. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). As the Supreme Court observed in Sullivan v. Zembley, 493 U.S. 521 (1990) a recent decision invalidating SSA regulations governing the eligibility of children for SSI disability payments, "[s]ince the Social Security Act expressly grants the Secretary rulemaking power, 'our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious.'" *Id.* at 528 (citing Bowen v. Yuckert, 482 U.S. 137, 145 (1987) (quoting Heckler v. Campbell, 461 U.S. 458, 466 (1983)). *See also* Batterton v. Francis, 432 U.S. 416, 424-26 (1976). Thus, SSA's regulations defining beneficiary interest for the purposes of representative payment to mean the physical and mental ability to manage benefits must be given deference, if they are not manifestly contrary to the purposes of the Act, that is, if they are based on a permissible (though not the only permissible) construction of the statute. In the case of representative payment, SSA is authorized, but not required, by the Act to make rules and regulations to carry out provisions of Titles II and XVI with regard to the appointment of a payee, 42 U.S.C. § 405(a) (1988) (made applicable to Title XVI by § 1383(d)(1). Thus, § 405(a) can be read to provide SSA express authorization to elucidate beneficiary "interest" for the purposes of certification under §§ 405(j) and 1631. Since Congress has provided no direction and there are several possible legislative objectives to be furthered by representative payment, review of the regulations falls within *Chevron*'s second step. Although second step review is generally a rubber stamp, here the regulations should fail to meet the test. In the absence of a definition of "incapability" or explanation of what is meant by the "ability to manage benefits," SSA's procedures are not adequate either to protect beneficiaries against arbitrary action or to permit beneficiaries to order their affairs so as to avoid indirect payment of benefits if they wish. Nevertheless, no matter how vacuous SSA's standard is in practice, it may be regarded as rational for *Chevron* purposes because it is within the undefined boundaries of congressional purpose. If SSA regulations pass the arbitrary and capricious test of *Chevron*, they are binding on the court as to the meaning of the congressional grant of representative payee authority to SSA. However, a court must still decide whether the standard to be applied, supplied by the agency, saves the statute from challenges that it fails to meet due process requirements for rationality. Having found that the regulations are not arbitrary for *Chevron* purposes, it is unlikely that the statute thus clarified would be found arbitrary for due process purposes. This bootstrap operation seems to permit the agency to legitimize its own organic legislative authority for constitutional purposes.

ing objective, empirical and expert judgments.[96] Thus, other instances of broad agency discretion to act "in the public interest," have been regarded as legitimate on the basis of agency expertise: the agency's ability to make informed expert judgments to accomplish broad legislative goals.[97] It can be argued that, even in the absence of congressional directives, there is inherent in the grant of discretion to an agency the limiting responsibility to make rules that reflect the expertise to which Congress has presumably deferred in granting it broad discretion. Whatever its merits in other contexts,[98] agency expertise cannot be used as a basis for legitimacy in the case of representative payment. SSA has not issued a rule establishing a standard of incapability reflecting any expert information or judgment. SSA guidelines stating what evidence of incapability will be considered by the agency[99] is not a substitute for a standard to guide claims representatives, ALJs and health care professionals in making incapability determinations. SSA has chosen not to establish such a standard, either through informal rulemaking[100] or by an interpretive ruling.[101] While agency policy with

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96. Stewart, *supra* note 73, at 1678 n.35 ("[The ICC's powers] are expected to be exercised in the coldest neutrality. . . . And the training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of its powers. . . .") (citing ICC v. Chicago, R.I. & P. Ry., 218 U.S. 88, 102 (1910)).

97. For example, economic regulation of certain industries has been entrusted to regulators such as the Interstate Commerce Commission and the Nuclear Regulatory Commission because they were schooled in the relevant technology and economics. *See, e.g., id.*; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194-95 (1941).

98. Professor Stewart observes that faith in the existence of an objective basis for social choice by administrative agencies has been undermined by the complexities of a managed economy and pluralist political analysis. Stewart, *supra* note 73, at 1683.

99. POMS §§ 00502.010A5, .020-.025, .030A, .050B (1991).

100. While the APA does not require that SSA formulate rules to guide the exercise of its discretion, it does require that certain kinds of rules be promulgated in certain ways. The SSA's statements contained in regulations and in POMS regarding the representative payee program are "statement[s] of general or particular applicability and future effect" designed to implement §§ 405(j) and 1631 and thus can be characterized as "rules" under the Administrative Procedure Act (APA). 5 U.S.C. § 551(4) (1988). The APA requires that some rules must be promulgated in accordance with § 553's notice-and-comment requirements for informal rulemaking. Although § 553 exempts from informal rulemaking requirements "matter[s] relating to . . . benefits," such as representative payment. 5 U.S.C. § 553(a)(2) (1988), the Department of Health & Human Services (HHS) has waived this exception. 36 Fed. Reg. 2532 (1971). However, the HHS waiver does not apply to interpretative rules and policy statements. That is, HHS has not waived the § 553 exception for interpretative rules and general policy statements.

101. Interpretive rules, statements of general policy or rules of procedure need not be propounded through informal rulemaking. Thus, if SSA statements pertaining to the incapability standard contained in POMS but not SSA regulations are regarded as interpretative rulings, they need not be formulated in accordance with § 553 procedures. In addition, APA notice-and-comment requirements do not apply when the agency makes a finding that APA procedures would be

regard to such a standard could also be formulated in case-by-case adjudications,[102] SSA has indicated that case-by-case determinations made by claims representatives and ALJs or the Appeals Council are not to be considered general statements of agency policy or precedent.[103]

"impractical, unnecessary or contrary to public interest." However, SSA has not made such an finding with regard to its representative payee policies, and in fact SSA regulations governing the appointment of representative payees have been published in the *Federal Register* after notice and comment. By and large, the POMS elaborates upon the general statements of policy contained in SSA representative payee regulations promulgated in compliance with informal rulemaking requirements, and thus may be regarded as interpretative rulings or internal agency procedures. Although such rulings and procedures may bind the agency, they may not adversely affect individual rights and obligations unless they are published in the *Federal Register*. 5 U.S.C. § 552(a)(1)(D) (1988). SCHWARTZ, *supra* note 87, § 4.8. There are some matters, such as SSA policy with regard to the suspension of benefits, however, which are not addressed in the regulations and are provided for only in the POMS. See *supra* note 34. Thus, an argument could be made that SSA's rules regarding the suspension of benefits do not have legislative effect, because they have not been so published.

102. Even where the APA does not require rulemaking procedures be followed by an agency, such as in the case of interpretative rules and general statements of policy, § 552 does require SSA to publish in the *Federal Register* such interpretative and policy statements as well as substantive rules of general applicability adopted as authorized by law. 5 U.S.C. § 552(a)(1)(D) (1988). However, § 552 does not require publication of rules of particular applicability, such as individual representative payee determinations or their affirmance by ALJs or the Appeals Council. If they are not published, however, they cannot be regarded as statements of binding agency policy. 5 U.S.C. § 552(a)(1) (1988). *But see* Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982).

103. It is SSA's practice to publish some agency decisions in the agency's Office of Hearings and Appeals Law Reporter with the express admonition that they are not published "to express opinions or attempt to influence" agency action or to be considered authority which can be cited or an expression of official agency policy. Since SSA does not consider such decisions to be precedent, they cannot be regarded as rules.

In the absence of either a published rule defining incapability or a body of adjudication establishing agency policy regarding incapability, determinations made by claims representatives and ALJs that certain beneficiaries are incapable might be challenged as arbitrary and capricious and therefore violative of § 706 of the APA. Although it does not require that all agency determinations be made in accordance with standards embodied in rules and regulations, § 706 requires agencies to render decisions that are not arbitrary and capricious or an abuse of discretion and that are within statutory limitations and authority. 5 U.S.C. § 706(A), (C) (1988). Section 706 has been interpreted to apply to informal agency action and to require that the agency act reasonably within the confines of congressionally intended policy as well as express statutory limitations. Overton Park v. Volpe, 401 U.S. 402 (1971); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *See generally* SCHWARTZ, *supra* note 87, §§ 10.13-10.17.

Apart from constitutional and APA requirements, SSA may find that it is to its advantage to set incapability standards through rulemaking as a matter of sound administrative practice. The promulgation of capability standards, even internally and without public notification, would improve the accuracy, consistency and efficiency of SSA's decisions on payee matters. The promulgation of those standards through public notice and hearing procedures that permit affected persons to participate in the rulemaking process would promote perceptions of agency fairness, respect for

More importantly, it cannot be claimed that determinations made by Civil Service claims representatives who are not trained to assess client functioning, who administer no standardized tests or evaluations of behavior, and who are given no guidance in the form of rules or precedent as to the level of acceptable functioning sufficient for "capability," are legitimate because they are based on administrative expertise. Nor should the individual, personal opinions of private health care providers about capability be regarded as expert when they are rendered without regard to a standard of minimally acceptable functioning, a standard ultimately based on a value judgment about acceptable life styles.

It would be possible for SSA to devise standards and procedures that use expert information about beneficiaries. The American Bar Association's Commissions on Mental Disability and Legal Problems of the Elderly (ABA Commissions) have recommended that in devising a definition of incapacity for guardianship purposes, a finding be required that the individual is likely to suffer substantial harm by reason of an inability to manage financial affairs.[104] The ABA Commissions further recommend that a finding of incapacity be supported by evidence of functional impairment over time.[105] Increasingly, statutes and judicial

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individuals and rational private ordering. *See infra* notes 207-27. Finally, SSA may find that with an express definition of incapability to guide claims representatives and health professionals the number of beneficiaries provided payee services would be decreased and hence SSA's oversight and monitoring responsibilities lightened.

104. Where a concept of legal competence is used to legitimate state action to protect the health and safety of individuals, such as conservatorships or guardianships, information about behavior related to health and safety should be obtained. Yet, psychologists have only just begun to publish guidelines for the assessment of competency in adults for guardianship purposes which take neurological and functional deficits into account. THOMAS GRISSI, EVALUATING COMPETENCIES 274 (1986). Researchers in gerontology have described several distinct abilities associated with self-care and property management, such as maintenance of biological functions and health, perception, cognition and social role, and they have constructed written instruments to assess individual ability to carry on simple and complex activities within each of those areas. *See, e.g.*, M. Powell Lawton et al., *A Research and Service Oriented Multilevel Assessment Instrument*, J. OF GERONTOLOGY 37 (1982). Michael D. Casasante et al., *Individual Functional Assessment: An Instruction Manual*, 2 MENTAL & PHYSICAL L. REP. (1987) (formely Mental Disability L. Rep.). Such assessment instruments could be used by SSA systematically to gather data about individual functioning upon which capability determinations would be based. Because they are not based on value judgments of the kind delegated to administrators and judges about acceptable levels of functioning, assessment instruments designed to elicit legally relevant information cannot be used as the sole means for determining competence or capability. They can, however, be used in conjunction with personal interviews and physical examinations, to provide legal decisionmakers with expert information necessary to the exercise of their authority to make such judgments. SSA has not taken steps to obtain such expert information.

105. This evidence is also relevant for representative payment purposes. The ABA Commis-

decisions regarding competence for guardianship purposes require information about actual functioning to be provided by experts to the decisionmaker, rather than permit inferences about such functioning to be based on a medical diagnosis.[106] In addition, reflecting an understanding of the range of function necessary to cope with different situations, more states now provide for "limited guardianship" rather than all-or-nothing determinations of competence.[107]

The level of competence to be required of social security beneficiaries before they loose their right to control expenditures is a matter of attaching significance to facts about functional capacity, based on judgments about acceptable living standards and appropriate behavior. As such, the judgments made by claims representatives are no more expert than those made by the beneficiary or persons engaged in relationships with him or her.[108] Although not expert, such value judg-

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sions recommended that:

> The definition of incapacity should focus upon but not be exclusively limited to the following elements: (a) incapacity may be partial or complete; (b) incapacity is a legal, not a medical term; (c) a finding of incapacity should be supported by evidence of functional impairment over time; (d) the finding of incapacity should include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs; and (e) age, eccentricity, poverty or medical diagnosis alone should not be sufficient to justify a finding of incapacity.

American Bar Association Commission on Mental Disabilities and Legal Problems of the Elderly, GUARDIANSHIP· AN AGENDA FOR REFORM 15 (1989) [hereinafter AGENDA FOR REFORM].

106. A recent study of concepts of legal competency utilized in civil and criminal law, including competency to stand trial, to waive procedural rights, to parent children, to care for self and property, and to consent to treatment, notes six characteristics common to all: functional, contextual, causal, interactive, judgmental and dispositional. All the legal constructs of competency were based, in part, on findings or assumptions about a person's ability to perform certain tasks. *See* GRISSI, *supra* note 104, at 14-30; BRUCE DENNIS SALES ET AL., DISABLED PERSONS AND THE LAW (1982). Diagnoses are themselves conclusions reflecting a particular way of categorizing and characterizing empirical data, often for purposes other than those for which legal competence determinations are made.

107. Thus, a person may be declared incompetent to manage financial matters, but competent to make personal decisions or incompetent to handle complex financial matters, but competent to purchase groceries, clothing and housing. At least 40 states are regarded as recognizing some limited form of protective arrangement by statute or judicial decision. LEGAL COUNSEL TO THE ELDERLY, DECISION-MAKING, INCAPACITY, AND THE ELDERLY: A PROTECTIVE SERVICES PRACTICE MANUAL 76 n.93 (1987). *See also* Handbook of the National Conference of Commissioners on Uniform State Laws, Uniform Guardian and Protective Proceeding Act, prefatory note (1982).

108. [E]xpertness is not wisdom and . . . the relative ordering of values in a society—the ultimate problem of choosing between alternative courses of action—is something we do after the expert has completed his task of collecting data, describing, and, to a limited extent, predicting.

Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 472 (1954).

ments could be regarded as legitimate if they were made by persons directed by or accountable to the electorate through the legislature or executive branches.[109]

C. *The Lack of Executive Accountability*

Thus, another basis upon which to make a claim of legitimacy for exercises of SSA's administrative discretion is the fact that, as a part of the executive branch, SSA is accountable to the President.[110] There may be many situations in which the President controls agency discretion, but the representative payee program is not one of them. The SSA is one part of one agency among hundreds of federal agencies under the President's direction, and representative payment represents only a small portion of the administrative actions taken by the Agency each year. To believe that the decisions made by SSA line administrators in appointing payees or even the rulemaking decisions of SSA officials will come to the attention of the President or have any impact on his or her election is to engage in fantasy. The President is a single official to whom thousands of agency bureaucrats are responsible and whose reelection is dependent on an evaluation of hundreds of actions more important to the electorate than the administration of low visibility programs like representative payment. To speak of executive accountability as a legitimating factor in this context is meaningless.

IV. A Search for Legitimacy in the Constitution

To the extent that the legitimacy of governmental intrusion into the private affairs of individuals depends on the actors being directed by or accountable to the governed, compliance of SSA standards and procedures with values embodied in a popularly established Constitution could provide a basis for the claim that they are legitimate. Thus, if present SSA procedures conformed with constitutional due process demands that either provided protection for autonomy interests or re-

109. Interestingly, one circuit judge has noted that "[a]n argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." Wright, *supra* note 87, at 585.

110. This rationale is suggested by the Court in the *Chevron* case. There, the Court was asked to determine when judicial deference should be given to an agency's interpretation of its statutory authority. *Chevron* held that where the statute is silent or ambivalent, the agency's interpretation is controlling unless it is arbitrary. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Court reasoned that though unguided by the legislature, the agency is accountable to the electorate through the executive branch in a way that judges are not, and therefore judges should defer to agency interpretations. *Id.* at 865-66.

quired the provision of needed assistance, SSA procedures might be said to reflect a value choice underlying those due process requirements. As such, the procedures would gain legitimacy because they embodied values adopted by the populous along with the Constitution. For example, as we have seen, SSA's current practices do not conform to the legal justice model, protecting liberty interests, for several reasons: they provide no standard of incapability for decisionmakers to apply; they provide no notice or opportunity to be heard in a face-to-face meeting with a decisionmaker prior to a determination of incapability; they provide no legal or lay assistance to frail and vulnerable people seeking to avail themselves of post-determination appeals available; and they provide neither beneficiaries or payees review or appeal of misuse determinations.[111] Yet, these procedures meet the due process requirements established by the Supreme Court in *Mathews v. Eldridge*.[112] However, the *Mathews* test cannot be regarded as the expression of a legitimating constitutional preference for interests in autonomy over interests in beneficence because, as discussed below, *Mathews* established an impossible calculus through which to protect individual autonomy interests. That is, the *Mathews* test: misconceives the nature of individual autonomy; assumes that individual interests in autonomy, such as controlling benefit expenditures, can be quantified and weighed; proceeds on the false premise that a standardless test such as "interest of the beneficiary" can be accurately applied; assumes that the degree to which procedures increase accurate applications of law to facts can be determined; and seeks to identify and assess the government's interest in providing payee assistance, even in the absence of congressional declarations of the purposes sought to be accomplished by representative payment.

Similarly, SSA's current procedures cannot gain legitimacy as the embodiment of beneficent values by compliance with constitutional requirements because the Supreme Court has made it clear that the Constitution embodies no such values. Although they include some attributes of the therapeutic justice model, such as the assumption that incapacity is a discoverable fact, SSA procedures do not conform to a therapeutic model because they fail affirmatively to identify beneficiaries whose interests would be served by representative payment; fail to establish eligibility criteria which, if met, would entitle beneficiaries

111. *See* Farrell, *supra* note 4 for a discussion of the compliance of SSA's representative payee procedures with the legal justice model.

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

to the services of a payee; fail adequately to investigate the reliability of proposed payees, at least until the requirements of the 1990 amendments are met; fail to provide payee services to those whom SSA has determined need such services and suspend benefits instead; and provide only perfunctory monitoring of payee performance and accept responsibility for the fidelity of the payee it has appointed only where SSA has been at fault.[113] If the constitutional requirements to which the program conforms assured the provision of assistance (which provides the ethical justification for paternalistic limitations on autonomy) such compliance would itself lend legitimacy to SSA's program because of popular acceptance of the Constitution. Such requirements could be regarded as a democratically made decision to favor beneficence over autonomy. However, as discussed below, the Supreme Court's decisions in *O'Connor v. Donaldson*,[114] *Youngberg v. Romeo*[115] and other cases have made it clear that the Constitution imposes no affirmative obligations on the government to provide assistance or treatment, even when it curtails liberty to do so, unless complete deprivation of physical liberty has occurred and the state has assumed custodial responsibility.[116] There are, then, no constitutional requirements that automony be protected or that the promise of beneficence entailed in representative payment be a meaningful one. Thus, the program gains no legitimacy based on the popular acceptance of constitutional values through its compliance with *Mathews* and *Donaldson* due process requirements.

A. The Legal Justice Model and the Mathews v. Eldridge *Test of Procedural Due Process*

1. SSA Compliance with the Mathews v. Eldridge *Requirements*

Despite the fact that SSA's procedures fail effectively to safeguard liberty interests, they do seem to meet the due process requirements set forth in *Mathews v. Eldridge*. Thus if SSA procedures for making capability determinations and monitoring payee performance are measured against *Mathews*, it is more likely than not that the Supreme Court would find that they comply with due process requirements.

As a threshold matter, whether representative payment procedures

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113. *See* Farrell, *supra* note 4; Farrell, *supra* note 8, at 3-4 (discussing the compliance of SSA's representative payee procedures with therapeutic justice model).

114. O'Connor v. Donaldson, 422 U.S. 571 (1975).

115. Youngberg v Romeo, 457 U.S. 307 (1982).

116. *See, e.g.*, Deshaney v. Winabego County, 109 S. Ct. 998 (1989).

meet the due process requirements established in *Mathews* depends upon whether a beneficiary's interest in controlling the expenditure of social security benefits is a constitutionally protected liberty or property interest.[117] The Supreme Court has held that in order to be protected by due process, an interest must be defined by constitutional provisions or specific state or federal rules of law, either statutory or common law.[118] Entitlement to social security benefits has been recognized as property protected by due process.[119] An SSA determination of a need for representative payment, impairs the legal right the beneficiary would otherwise have to control such property. This fact should support a finding that the interest of beneficiaries in controlling the expenditure of their benefits is an interest entitled to due process protection, apart from protection of the entitlement itself. In addition, a social security beneficiary can be said to have a personal interest in not being determined "incapable," which is akin to one's liberty interest in a good reputation or property interest in controlling the disposition of belongings.[120] Several federal courts have reached the same conclusion, though usually without detailed analysis.[121] However, they have often

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117. The Constitution does not require that due process be provided whenever personal interests are affected by government action. O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980). Rather it requires such process only where certain property or liberty interests found by the Supreme Court to be constitutionally protected are involved. Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* William Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); 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). Interests regarded as "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 (1979) (attorney's right to be admitted to practice out of state on a case-by-case basis held not a property or liberty interest protected by due process).

118. *E.g.*, Vitek v. Jones, 445 U.S. 480 (1980); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* TRIBE, *supra* note 80.

119. Goldberg v. Kelly, 397 U.S. 254 (1970).

120. The Court's positivistic approach has not prevented it from recognizing as property interests less than full legal ownership, Fuentes v. Shevin, 407 U.S. 67, 86-87 (1972), or from recognizing as protected liberty, a person's interest in a good reputation, so long as damage to it affects a legal right, such as the right to contract or purchase goods. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting of name as a chronic drinker affecting legal right to purchase liquor held a protected liberty interest). *Cf.* Paul v. Davis, 424 U.S. 693 (1976) (distribution by police of flyers identifying individual as known shoplifter held not a protected liberty interest where no other interests protected by due process were implicated). See TRIBE, *supra* note 80, at 701-706.

121. *See, e.g.*, Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989); Jordan v. Schweiker, No. CIV-76-88,79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, Courts file); Tidwell v. Schweiker, Civ. Action Nos. 73-C-3014 and 74-C-183 (N.D. Ill., June 23, 1976), *aff'd in part, rev'd in part denied*, 677 F.2d 560 (1982), *cert. denied*, 461 U.S. 905 (1983). *Cf.* McGrath v.

found that the constitutionally cognizable interest in direct payment was adequately protected by SSA procedures.

By and large, where liberty and property interests are affected by governmental action, the Supreme Court has required the government to provide certain procedures as a means of assuring that society's rules governing behavior and the distribution of public benefits are accurately and consistently applied.[122] It has done so by adopting a kind of utilitarian, cost-benefit calculation in which the value to the individual of the procedural protection is weighed against the cost to society of providing the procedure. Thus, in *Mathews*, the Supreme Court ruled that the due process requirements can be determined by weighing:

> [f]irst, 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.[123]

Several lower federal courts have expressly applied the *Mathews* test to representative payment and the interest of social security beneficiaries in controlling the expenditure of their benefits. Most often the cases were brought to establish a due process right to notice and an

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Weinberger, 541 F.2d 249 (10th Cir. 1976). These courts' application of the *Mathews v. Eldridge* balancing test 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 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 the determination being made.

122. Although arguments have been made that procedural fairness should be required because of its "intrinsic value" in respecting the dignitary interests of individuals by permitting them to participate in decisions which affect them, the Supreme Court has generally required procedural safeguards because of what has been termed their "instrumental value" in achieving accurate and efficient determinations of fact. TRIBE, *supra* note 80, at 666-69.

123. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). 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 pre-determination evidentiary hearings on demand before such disability insurance benefits were terminated. The *Mathews* Court viewed the procedures used by SSA in terminating Title II disability benefits as constitutionally sufficient. These procedures included notice and an opportunity to participate in the state agency's first "tentative" determination of continued eligibility by completing a questionnaire about one's condition and by submitting written statements. 424 U.S. at 323-24. The Court was impressed with the objective nature of the medical evidence upon which continued eligibility is based and thus found oral hearings of little additional value in producing more accurate determinations.

oral, trial-type hearing before an incapability determination was made. In each case, the court found that the decreased likelihood of error that pre-determination notice and hearings would afford was outweighed by the expense and inconvenience to the government of providing them. In *McGrath v. Weinberger*, plaintiff Title II and Title XVI beneficiaries brought a class action challenging the procedures used by SSA prior to 1976 to appoint representative payees.[124] McGrath was given no notice at all or opportunity for a hearing prior to being deprived of his right to spend his social security check. The trial and appellate courts agreed that application of the *Mathews* test to the interests at stake indicated that prior notice and hearing were not required by due process.[125] A three-judge court in *Tidwell v. Schweiker* came to the opposite conclusion with regard to SSA's pre-1976 procedures, but subsequently approved SSA's revised procedures, which are substantially the same as those in effect today.[126] Finally, in 1983, in *Jordan v. Schweiker*, a

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124. McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976). After his discharge from a state mental hospital, the named plaintiff had been found to be incapable of managing his benefits. The determination was based on a psychologist's opinion to that effect and the hospital administrator's report that McGrath spent his money foolishly. *Id.* at 251.

125. The *McGrath* court ignored the fact that the plaintiff in *Mathews* had at least been given notice and some opportunity to submit evidence prior to the termination of benefits. The appellate court in *McGrath* reasoned:

> The private interest affected in this action is the free use of Social Security benefits. There is not a termination of benefits, as was the case in *Eldridge*, but rather a deprivation of free use of benefits. Since the Supreme Court in *Eldridge* held that due process was not violated by terminating benefits without prior opportunity for an evidentiary hearing, it would be an unwarranted departure on our part to hold that due process requires prior notice and an opportunity for a hearing where there has been no termination of benefits.

541 F.2d at 253.

The court went on to find that the risk of an erroneous deprivation of the free use of benefits was minimal where determinations were based primarily on good faith evaluations by psychologists who had observed the beneficiary. *Id.* In addition, the court noted that the plaintiffs had available to them fair and adequate post-determination procedures for review of the decision. *Id.* at 254. Finally, it found the governmental interest in avoiding the time and expense of prior oral hearings was substantial and outweighed the plaintiffs' interest. *Id.*

126. Tidwell v. Schweiker, 677 F.2d 560, 564 (7th Cir. 1982). In *Tidwell*, plaintiffs were patients in a state mental hospital entitled to receive social security disability benefits. They claimed that the federal and state scheme for appointing the superintendent of the institution as representative payee for incompetent patients, who had no family members able to serve, without notice or an opportunity to submit evidence, violated due process. *Id.* at 563. The district court found that the procedures used to appoint a payee violated due process standards. *Id.* at 566. The court weighed the different factors required by *Mathews* and found that the present administrative process "obviously lacks any procedural safeguards." Tidwell v. Schweiker, 73-C-3014 and 74-C-183 at 17 (N.D. Ill. 1976). Its conclusion was not evaluated by the appellate court, however, because subsequent to the decision, both the state and the federal government changed their procedures, and the three judge court amended its order, finding the revised federal procedures com-

district court rejected plaintiffs' contention that limiting beneficiaries to written objections before appointment of a payee did not adequately protect beneficiaries from the risk that an incompetent or untrustworthy payee would be appointed.[127]

Fifty years after authorizing representative payment, Congress has addressed the notice and hearing issue in representative payment, but only obliquely. As amended in 1990, the Social Security Act requires SSA to provide notice to the beneficiary 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.[128] As we have seen, neither the Act nor the Due Process Clause, as *Mathews* itself held, require a hearing in similar circumstances before certain determinations of entitlement are made.[129] Thus, the 1990 statute does not require a hearing before a determination of incapability is made or implemented.

It can be argued that the advance notice now required by statute, and which is provided by SSA, is constitutionally insufficient because it fails to inform beneficiaries what standard of capability they have failed to meet and fails to inform them of the reasons why SSA finds they have not met the standard.[130] The "advance" and "formal" notices

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ported with due process. The court noted that "although need stage hearings would provide the greatest safeguards, they [are] not constitutionally required." *Id.* at 16.

127. Jordan v. Schweiker, No. CIV-79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, Courts file). Expressly applying the *Mathews* test, the court found that first, plaintiffs' interest in control over their benefits was "substantial," second, the risk of error under the present procedures was slight and the provision of an oral hearing prior to the selection of a payee would not significantly reduce the risk of possible error, and third, the procedures were "in balance with the Government's fiscal and administrative burden."

128. 42 U.S.C.A. § 405(j)(E)(i)-(ii) (West 1991). The 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 and shall explain the right to appeal the designation of a particular person as a payee, or the payee selected, and the right to review the evidence upon which the designation is based and to submit additional evidence. *Id.* § 405(j)(E)(iii)(I)-(III).

129. As decided in *Mathews v. Eldridge*, a post-determination 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 beneficiaries proposed for representative payment do.

130. The purpose of notice to beneficiaries whose interests are affected by certification determinations is to permit them to provide SSA with information relevant to the determination. Thus, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), the Supreme Court stated that "due process . . . [requires] notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the [judicial] action and afford them an opportunity to present their objections." *Id.* at 314. SSA's "advance notice," provided only after an incapability determination has been made, does not afford the beneficiary notice of the pending determination or an opportunity to present objections until the determination has been made.

used by SSA provide little information that would be useful to a beneficiary interested in knowing on what grounds to object to or protest the impending action.[131] SSA's notice explains only that "[t]he facts we have show that this would be best for you."[132] The open-ended, "best for you" standard is no more informative of the basis upon which the determination has been made than is the "interest" standard provided in the Act or the "capability" standard used in regulations. A recipient would be hard-pressed to know what additional facts to give SSA. However, without the formulation of a more predictable standard by the Secretary, it may be difficult to provide beneficiaries with adequate notice of impending payee certifications. Furthermore, *Mathews* requires the cost of more informative notices to be weighed against their benefit in producing more accurate incapability determinations: this is an unknown and unknowable fact.

Whether SSA's procedures provide a hearing which meets the *Mathews* test depends on the application of the three *Mathews* factors[133] and involves at least two interrelated subissues: first, what kind of a hearing is required (what attributes must it have, including the opportunity to present oral testimony) and second, when is it required: at stage one, before a determination of need has been made; at stage two, before a determination of need has been implemented by payment to the payee; or at stage three, after payment has been made to the payee. The "what" and "when" hearing issues are interrelated in that the presence, absence and character of an opportunity to be heard at one stage affects the need for such an opportunity at another stage of the proceedings. Currently, SSA provides no opportunity to be heard at stage one.[134] However, it does provide an opportunity to review written evidence, submit new evidence and ask for an explanation of the agency's plans at stage two.[135] Beneficiaries are not explicitly told in SSA's advance notice whether they are entitled to present their views in person to the individual who has made the decision.[136] Rather, they are invited to contact any social security office to ask for further infor-

131. *See supra* text accompanying note 28.

132. Planned Action *supra* note 27. *See* also Farrell, *supra* note 8, at 50.

133. *See supra* text accompanying note 123.

134. Except in certain high risk situations, and where no legal or medical evidence is available, SSA does not require claims representatives to conduct a face-to-face interview with a beneficiary for whom representative payment is proposed to obtain information relevant to the decision. *See* POMS § GN 00502.050B (1991).

135. 42 U.S.C.A. § 405(j) (West 1991); POMS § GN 00502.400 A.1, .2 (1991).

136. POMS § GN 00502.400A.2 (1991).

mation.[137] Since SSA procedures at stage three do include an opportunity for a full oral hearing before an ALJ, with many of the attributes of a trial type hearing, the question becomes, does due process require any additional opportunity to participate in a capability determination at stage one, before it is made, and at stage two, before it is implemented?

An application of the *Mathews* balancing test to this question would favor the provision of notice and some opportunity to be heard at stage one, prior to the capability determination, only if beneficiaries have a protected liberty interest in not being determined incapable, apart from their interest in controlling benefits discussed above. The identification and evaluation of this first *Mathews* factor is problematic. It can be argued that before a payee is actually appointed, beneficiaries' interests are little affected by an SSA determination that they are incapable of managing their benefits. Because the determination is not publicized in any way, it does not affect the beneficiary's standing in the community or reputation, and until it is implemented it does not affect the control of benefits. What the determination does, however, is burden any subsequent efforts to avoid the appointment of a representative payee. As observed by Professor Laurence Tribe: "Institutional pressures and commitments tend to militate against reversing even those deprivations that have not yet worked irreparable harm, since the governmental decision-maker may have acquired a vested interest in ratifying an action already taken."[138] Despite the burden of overcoming inertia placed on beneficiaries under SSA's current practice, both the *Tidwell* and *Jordan* courts concluded that these current procedures were constitutionally sufficient.[139]

The second factor that *Mathews* requires to be weighed is the

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137. Planned Action, *supra* note 27.

138. TRIBE, *supra* note 80, at 719.

139. In both *Tidwell* and *Jordan*, the courts reviewed current SSA procedures, including its regulations permitting objecting beneficiaries the opportunity to review and submit evidence relevant to SSA's "planned action" before implementation. Their conclusion that these procedures were constitutionally sufficient may, however, have been premised on the understanding that the opportunity to be heard, as well as advance notice, is provided *before* the determination to make representative payment is made. For example, in denying the claim that due process required more, the district court in the *Jordan* case stated that "[u]nder these procedures, prior to a determination that a beneficiary is in need of a representative payee and prior to the selection of a payee, the SSA provides all adult beneficiaries who have not been adjudged legally incompetent with advance notice of the proposed determinations." Jordan v. Schweiker, No. CIV-79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, Courts file). However, SSA does *not* provide advance notice until after a determination of need has been made. *See supra* note 27.

probable value of proposed procedures (here an opportunity for some sort of hearing at stage one) in decreasing the risk of erroneous deprivations of the private interest.[140] In those cases in which post-determination remedies have been found to be constitutionally insufficient, due process may be satisfied by a number of different pre-determination procedures.[141] In many contexts the opportunity to appear personally, present and comment upon evidence, make arguments, receive explanations of agency action and otherwise participate in a decisionmaking process has been held to provide a due process hearing, even though it falls short of a full trial-type hearing.[142] In *Mathews*, the Court refused

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140. It would be a mistake to assume that the post-determination process approved in *Tidwell* and *Jordan* necessarily forecloses constitutional requirements for pre-determination process. In Zinermon v. Burch, 494 U.S. 113 (1990), the Supreme Court recently held that post-determination remedies of state tort law, including full evidentiary hearing, were not constitutionally sufficient where Florida had granted broad, unguided discretion to state officials to deprive persons of their liberty by admitting them to mental institutions and state officials could have, but failed to, establish pre-deprivation safeguards to prevent predictable, unlawful losses of liberty. Willing to consider the value of pre-deprivation procedures in addition to post-deprivation remedies, the Court found such procedures authorized by legislation, possible to devise and valuable in preventing erroneous determinations regarding liberty interests. Like the officials in *Zinermon*, SSA has been granted broad discretion to deprive social security beneficiaries of a significant liberty interest and has been provided little statutory guidance in doing so. In addition, the significant determination to be made in both the *Zinermon* situation and representative payment is the competence or capability of an individual to, in the one case, give consent to commitment and, in the latter, to handle benefits. The *Zinermon* Court in effect held that the Constitution requires the promulgation of feasible, pre-deprivation procedural safeguards to prevent predictable errors. So it might be said that SSA has a constitutional obligation to promulgate feasible, pre-deprivation (stage one and stage two) procedural safeguards to prevent erroneous determinations in favor of representative payment.

141. Zinermon v. Burch, 494 U.S. 113 (1990); TRIBE, *supra* note 80, at 719. Professor Tribe cites the following cases in which post-determination hearings have been found inadequate by the Supreme Court: Perry v. Sindermann, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Sheven, 407 U.S. 67 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Cases in which no prior hearing was required often involved conflicting property rights in the same subject matter, *see, e.g.*, North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975), or state judicial remedies were available to compensate and deter illegal government action, *see, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977), neither of which apply to representative payee determinations.

142. Thus, in *Goldberg*, 397 U.S. 254, the threatened loss of subsistence benefits triggered the requirement for a full trial-type hearing before termination. However, in *Bell*, 402 U.S. 535, the loss of a driver's license required less than a full trial-type prior hearing to determine the probability that a judgment against an individual involved in a traffic accident would require proof of his financial responsibility. And, in Goss v. Lopez, 419 U.S. 565 (1975), the interest of students in remaining in school was sufficient to require a school to afford its students some opportunity to explain their position to school officials prior to their disciplinary suspensions, even if it was only a chance to explain minutes after the incident at issue.

to find that due process required such an opportunity because it was impressed with the fact that the disability determinations at issue in *Mathews* were based largely on objective, written medical evidence.[143] SSA incapability determinations are not made on the basis of objective, empirical, medical findings, but rather on the personal opinions of physicians and claims representatives about what functional capacities a person needs to live adequately in the community, such as whether it is necessary to be able to read, make change, take buses, tell time, etc. Those opinions may often depend on the credibility of evidence which can be best presented in an oral hearing. And thus, providing an opportunity to participate orally in the incapability determination would presumably decrease the likelihood of error.

Although not a constitutional decision, the Supreme Court's opinion in *Califano v. Yamasaki*, suggests the value of proposed pre-determination opportunities to be heard.[144] In order to avoid unnecessary constitutional adjudication, the Court decided the case on statutory grounds, but the Court's reasoning is relevant to due process analysis and to construction of the Social Security Act. In *Yamasaki*, the Supreme Court recognized that where Title II benefits "required for ordinary and necessary living expenses"[145] were at issue, a written review, prior to a determination not to waive recoupment of overpayments, was insufficient. By statute, the Secretary's determination whether to waive recoupment of overpayments turned on an assessment of fault, equity and good conscience. Finding that those determinations depended on an evaluation of "all pertinent circumstances, including the recipient's intelligence . . . and physical and mental condition as well as his good faith,"[146] the Court stated:

> We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility,

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143. Professor Mashaw has challenged the Supreme Court's notion that disability determinations are founded on unbiased medical reports and documentary evidence, because the determinations are highly judgmental requiring an assessment of the effect of impaired functions on various selected capacities. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 41-42 (1976).

144. 442 U.S. 682 (1979).

145. Califano v. Yamaski, 422 U.S. 682, 686 (1979) (quoting 20 C.F.R. § 404.508(a) (1978)).

146. *Id.* at 697 (quoting 20 C.F.R. § 404.507 (1978)).

> and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.[147]

The same might be said of sections 205(j) and 1631 of the Act. Like waiver of recoupment, representative payment is authorized only after the Secretary has made a determination of "interest" which, like the waiver determination, necessarily turns on an evaluation of all pertinent circumstances and requires evaluations of credibility and explanations for past behavior. SSA's current protest procedure requires that protests state the reasons for objection in writing and that the adjudicator review all of the factors leading to the decision and any new evidence submitted.[148] This procedure would seem to be an inadequate means of making factual findings under *Yamasaki*.

Finally, in considering the third factor, the government's interest, including the burden of additional procedures, the *Mathews* Court found that the cost of providing full evidentiary pre-determination hearings was significant. Among the costs that would have been borne by the government in *Mathews* had pre-determination hearings been required, was the cost of erroneously continuing, until a hearing could be held, to pay benefits to low income recipients from whom erroneous payments could not easily be recovered. Unlike the situation in *Mathews*, SSA does not bear any additional cost in the form of continued erroneous payments if payee determinations are delayed by pre-determination hearings.[149] Thus, even if the liberty and property interests at stake in representative payment do not weigh as heavily as the entitlements at stake in *Goldberg* and *Mathews*, the value of additional procedural safeguards in the form of an opportunity for a face-to-face in-

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147. *Id.* at 697 (citation omitted). The Court held that the statute did not permit recoupment from a person who qualifies for a waiver, and thus the statute itself required an oral hearing on the waiver before recoupment, though not an adversarial evidentiary hearing. *Cf. Goldberg*, 397 U.S. at 269.

148. POMS § GN 00501.420B (1991).

149. In addition, beneficiaries who welcome the appointment of a payee will presumably waive the opportunity to discuss the prospect in person with an SSA representative, thus minimizing the costs of providing an opportunity for a face-to-face interview. The Court in *Yamasaki* did not find that requiring a pre-determination oral hearing imposed an inappropriate administrative burden, both because the hearing was an informal face-to-face meeting, rather than a formal adversarial hearing, and because fewer beneficiaries requested waivers than had been anticipated. The Court noted that in complying with the district court's order for pre-determination oral hearings, SSA had granted "a short personal conference with an impartial employee of the Social Security Administration at which time the recipient presents testimony and evidence and cross-examines witnesses, and the administrative employee questions the recipient." 442 U.S. 682, 697 (1979) (quoting the brief filed on behalf of Respondent, Yamasaki).

terview at stage one is great, and the additional costs to the government of requiring such safeguards would be little or none. For these reasons and the rationale supporting the Supreme Court's decision in *Yamasaki*, it can be argued that the *Mathews* test requires additional pre-determination procedural safeguards in representative payment. However, SSA's current practice of providing as much process for incapability determinations as it provides for eligibility determinations is likely to be sustained if challenged again on *Mathews* grounds because control over benefit expenditures is not weighed as heavily as the interests at stake in *Goldberg* and *Mathews*. If so, constitutional requirements, as defined in *Mathews*, do not protect the autonomy interests at stake in representative payment.

2. *Flaws in the* Mathews v. Eldridge *Calculus as a Basis for Legitimacy*

The instrumentalist calculation established in *Mathews* to test the constitutionality of agency procedures fails to safeguard the autonomy interests at stake in representative payment, and thus legitimate a legal justice model of procedure, for several reasons. First, the *Mathews* analysis would validate SSA procedures despite the fact that they do not require the application of a standard of incapability. That is, the *Mathews* test evaluates procedures according to the likelihood that they will produce an accurate application of law to facts, and then it requires a weighing of this benefit against the cost of providing it. However, in the case of representative payment there is no law to apply. SSA has not established a legal standard either through rulemaking or adjudication and the Constitution would not seem to require it to do so.[150]

Second, even if there were a standard indicating what functional level SSA will require in order for a beneficiary to retain control over the expenditure of benefits, the first step in applying the *Mathews* calculus requires an identification and weighing of the beneficiary's interest in retaining such control.[151] However, as *Mathews* and *Goldberg* make clear, courts are almost wholly unequipped to make this evaluation. In *Mathews*, the Court distinguished its earlier decision in *Goldberg* by finding that the *Mathews* beneficiaries' interest in continued disability insurance payments was of lesser weight than the

150. *See* discussion *supra* notes 83-95; *see also* Farrell, *supra* note 4.

151. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Goldberg beneficiaries' interest in continued welfare payments. Thus, it required a pre-determination hearing only in *Goldberg*, because of its importance to continued life itself.[152] But, that importance can also be attributed to the interests of many Title II insurance beneficiaries who were plaintiffs in *Mathews*.[153] Furthermore, control over the expenditure of benefits effectively controls the quality of life as it is experienced by many beneficiaries who have little or no other income. In accordance with what standard of value does a court assess the weight of such individual interests for *Mathews* purposes? Are there standards of value other than the relationship of the professed interest to life itself which was invoked in *Goldberg*?[154] If it is an objective standard—the importance a reasonable person would assign the interest—how is the court to learn what that might be? If the standard is a subjective one—the importance of the interest to the particular people who have it—how is the court to discern that importance? That interest differs depending on whether beneficiaries have other income and resources; have many or few living expenses; have available persons to serve as payees; or have a long or short prospect of receiving benefits? How many beneficiaries are in which situations? A court has no institutional mechanisms available to take these factors into account.[155] Such information is seldom forthcoming from the parties. Lawyers for social security plaintiffs in class actions have few resources to gather and present relevant statistical data about such matters in their briefs. Amicus curiae seldom participate in cases at the trial record, and law clerks have neither the time or expertise to do such research. The weighing of private interests affected by agency action is an impossible task for a court, even on a pragmatic level.[156]

Third, as pointed out by other commentators, *Mathews* also rests on the proposition that the only function of adjudicatory procedures is to reduce the risk of arbitrariness by assuring the accurate application

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152. The Court in *Goldberg* noted that termination of benefits "pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate." 397 U.S. 254, 264 (1970).

153. Many Title II beneficiaries have no income other than Social Security benefits.

154. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

155. For an effort to quantify the plaintiffs' interests in Mathews v. Eldridge, 424 U.S. 319 (1976), see Mashaw, *supra* note 143, at 38-39.

156. In addition there are serious conceptual difficulties in defining and articulating such interests.

of law to facts in a given situation.[157] Even accepting accuracy as its goal, the formula presents problems in the case of adjudications of incapability, because incapability is not a fact to be discovered. Rather, it is a dynamic, situational, temporal and relational condition which is given legal effect through the official value judgments at issue.[158] Thus, empirically verifiable information can be gathered that a given person is able to perform certain tasks and not others when dealing with familiar people, but not with strangers, or when well and rested, but not when sick and tired, and in their own surroundings, but not in new places.[159] The judgment must then be made whether these functional abilities are sufficient to permit the individual to live an acceptable life in the community, a judgment based on values held by the decisionmaker or adopted through some standard setting process. At bottom, capability, then, is a legal construct which is based on information about behavior but which is imposed to accomplish certain purposes; it is not simply an empirically demonstrable condition.[160] The *Mathews* effort to promote accuracy with regard to findings of incapability begs the real question, which is, when does it serve a legitimate state purpose to interfere in the relationships between social security beneficiaries and those persons with whom they associate by controlling the expenditure of their benefits?

Fourth, perhaps the most basic failure of the *Mathews* formula is its failure to value procedures for reasons other than their ability to produce accuracy, such as their protection of autonomy. Representative payment procedures should be viewed as one of several flexible, individualized ways in which to respond to the different functional abilities of social security beneficiaries to engage in relationships. This response, in turn, affects such functioning. Initiation of procedures to appoint a payee both responds to certain differences in relational functioning and affects such functioning by adjusting those relationships, including that of the beneficiary and SSA. It is through such relationships that the individuals define themselves, gain self-esteem and attain meaningful autonomy as experienced through control over their benefits and their lives.[161] Professor Jerry Mashaw has observed that the *Mathews* for-

157. *See, e.g.*, Mashaw, *supra* note 143.

158. MARTHA MINOW, MAKING ALL THE DIFFERENCE 79-81, 94-97 (1990).

159. GRISSI, *supra* note 104, at 15-16.

160. *Id. See* AGENDA FOR REFORM, *supra* note 105, at 15; Farrell, *supra* note 8, at app. I.

161. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). *See generally* JAY R GREENBER & STEPHEN A. MITCHELL, OBJECT RELATIONS IN PSYCHOANALYTIC THEORY 228

mulation of due process ignores such dignitary interests of participants in administrative process.[162] For example, even where informal face-to-face interviews would not increase the accuracy of agency determinations of incapability, the meetings may be valued by participants for the respect which such procedures pay them as worthy individuals. Individuals gain self-respect and dignity, at least in part, because they are respected by others, including the government. As recognized by Judge Wald:

> Perhaps the most important reason for generally insisting upon an oral hearing is that no other procedure so effectively fosters a belief that one has been dealt with fairly, even if there remains a disagreement with the result. Our system of government is founded on respect for, and deference to, the integrity and dignity of the individual. In the Government's dealings with individuals—especially with respect to those individuals' property rights—some mechanism must exist to ensure that those values are left intact, even when action is finally taken against the person. In a society like ours, which operates on the assumption of and relies for its continued stability on respect for our institutions and voluntary compliance with the dictates of law, it is crucial that its members perceive that their rights and interests are taken seriously and thoughtfully by the officials who are deciding their claims.[163]

Thus, many beneficiaries would value the opportunity to be heard *before* they are found incapable because of the regard for them as worthy human beings that the procedure reflects.[164] Such respect may be especially important in the case of representative payment determinations because a determination of incapability itself impugns self-esteem. The *Mathews* test does not protect these dignitary aspects of individual autonomy. It ignores the importance of mutual respect between government and the governed, or in the case of representative payment, between the assisted and the benefactor.

Moreover, the *Mathews* calculus fails to deal with the paradox involved in determinations of incapability and paternalism. If, in accordance with the traditional concept of paternalism, which places auton-

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(1983).

162. MASHAW, *supra* note 41, at 158-78.

163. Gray Panthers v. Schweiker, 652 F.2d 146, 162-63 (D.C. Cir. 1980) (footnote omitted) (Medicare beneficiaries disputing the denial of claims of less than $100 held constitutionally entitled to be informed of, or have access to, evidence on which carrier relied; beneficiaries also entitled to an opportunity to present evidence in support of their position in written form, or in oral form, if factual issues involving credibility or veracity were at stake.).

164. Any beneficiary proposed for representative payment who would find an interview with social security personnel about representative payment insulting, demeaning, frightening, undignified, or just a waste of time, should have the right to decline the meeting.

omy and beneficence in tension, representative payment is justified in forcing assistance upon private individuals only where their capacity for autonomous action is compromised (so-called "weak paternalism"), how do we devise procedures to determine that capacity? Procedures which safeguard autonomy are not needed if autonomy is impaired, but that is the question SSA procedures are needed to answer. And, those procedures cannot be evaluated unless we know whether there are autonomy interests to safeguard. A presumption might be made in favor of autonomy, but that could be done only through some legitimate mechanism such as a legislative or executive directive, expert findings, or constitutional adoption. Or, a presumption in favor of assistance might be made through those same legitimate mechanisms. The trouble with the *Mathews* test as a vehicle for legitimation is that it provides no starting point; it embodies neither the decision to value private autonomy more highly than state imposed assistance, nor assistance more highly than autonomy. *Mathews* cannot mediate, then, nor legitimate, either the legal or therapeutic justice models of procedure for it provides no way to break the deadlock between unquantifiable but conflicting public and private interests, which courts are institutionally incapable of weighing. *Mathews* cannot resolve the paradox because it is a creature of the polarization it projects upon problems posed by functionally different people. Thus, *Mathews* pits abstracted private and public interests against each other—the costs and benefits of procedures to the individual and the government—because they are assumed to be in conflict. If private autonomy and state imposed assistance are seen as antithetical, the Due Process Clause can only establish the rules for a zero sum game; the state's interest cannot be effectuated except by diminishing autonomy and visa versa. It cannot, and does not, choose between them.

Finally, the liberty interest which *Mathews* protects through due process procedures is autonomy only in the atomistic sense, not the relational sense in which people actually define themselves and experience self-control. As mentioned earlier, the liberty interests protected by due process are those liberties defined by the federal or state constitutions, state statutes or common law.[165] Thus, government actions affecting reputation, self-esteem and non-commercial relationships are not protected by due process unless otherwise defined and protected by statutes and constitutions or unless abstract common law capacities to

165. See discussion *supra* notes 117-21.

hold property and contract are implicated.[166] Similarly, the state's interest is conceived as an interest in imposing assistance on certain individuals for a number of possible reasons, with or without their consent. Traditionally, due process required clear, accurate justifications for such public intrusions into private affairs. Here, however, the question is as much about what is due to the beneficiary who needs and wants the help of a payee as about the right to refuse assistance.[167] Rather than define the problem of paternalism in polarized terms—atomistic autonomy and communally coerced remediation—the issues presented by old, ill, young, tired, and vulnerable social security beneficiaries might be viewed as multi-faceted, complex ones involving many people and interests. It is the beneficiary's participation in certain relationships such as those with caretakers, merchants, landlords, friends and families that is problematic when he or she cannot perform certain mental or physical functions, such as seeing, hearing, reading, understanding what is said, remembering, appreciating a place in time and space, etc. It is the facilitation of those relationships in which society has a legitimate interest, and not in an undefined beneficence in imposing assistance upon abstract individuals. The goal of the Secretary's authority to certify representative payment should be the adjustment of these relationships to meet the needs of individuals who function differently, and to meet the needs of the community to include those persons in the social body. Thus, I contend that the situations of social security beneficiaries who function differently do not present a dichotomy of private and public interests—autonomy and beneficence—to be reconciled, but a problem of relationships that need to be adjusted to permit more satisfactory social interaction. We do not need the rules for a zero sum game but a process for writing the rules; a process that is legitimate.

B. The Therapeutic Model and O'Connor v. Donaldson

1. SSA Compliance with the O'Connor v. Donaldson *Requirements*

Just as the Due Process Clause as interpreted by *Mathews v. Eldridge* does not require or legitimate the adoption of the legal justice model of procedure, neither does the Constitution require the adoption of the therapeutic justice model. That model places emphasis on outreach, expert information and diagnosis, informal decisionmaking, indi-

166. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); TRIBE, *supra* 91, at 677.

167. BRAKEL ET AL., *supra* note 10, at 27-28.

vidual remediation, close monitoring of the recipient of services and limited review of official decisions, all in an effort to assure the provision of needed assistance rather than protection of individual liberty interests or the public good. SSA's present procedures do not conform to the model largely because they fail to use expert determinations or assure the provision of assistance through adequate procedures for the selection, monitoring and enforcement of payee responsibilities. Yet, only such assistance justifies the imposition of representative payment on a paternalistic, *parens patriae* rationale. Furthermore, the Due Process Clause as construed by the Supreme Court in *O'Connor v. Donaldson*, and in several other decisions, does not require that it do so.[168] *Donaldson* and similar cases do not require as a matter of due process the provision of assistance even where liberty is restricted in its name. Thus, SSA compliance with the due process requirements announced in *Donaldson* would not indicate that SSA has conformed its practices to a constitutionally embodied value preference in favor of beneficence; no such value can be found in the Constitution as currently construed.

The Supreme Court has held that individuals have no affirmative constitutional right to education, subsistence or medical care.[169] Furthermore, the Due Process Clause does not compel the provision of such benefits even when liberties are limited by statute so that such benefits can be provided. Thus, the Supreme Court has ruled that if the state limits liberty in order to provide assistance and fails to provide it, liberty must be restored.[170] The Court has *not* ruled that in those circumstances the state must provide assistance. For example, in the somewhat analogous area of civil commitment, the Supreme Court has refused to rule that mentally ill people, even non-dangerous individuals committed to institutions against their will, have a constitutional right

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168. O'Connor v. Donaldson, 422 U.S. 563 (1975), *aff'g* 493 F.2d 507 (5th Cir. 1974) (civilly committed mental patient who was denied treatment was entitled to damages for injury to constitutionally protected liberty interest but not entitled to treatment unless the defendant could successfully invoke a good faith immunity defense).

169. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973) (education is not a fundamental right protected by the Constitution); Lindsey v. Normet, 405 U.S. 56 (1972) (decent, safe and sanitary housing is not a fundamental right); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits are not a fundamental right). In Harris v. McRae, 448 U.S. 297 (1980), the Supreme Court refused to find in the Constitution an affirmative right to medical care for poor women who claimed a right to Medicaid financed abortions. The Court reasoned that while the women had a constitutionally protected privacy interest in choosing abortion, the state did not unconstitutionally burden that decision by refusing to pay for such abortions, even though it would pay for childbirth.

170. *Donaldson*, 422 U.S. at 576, *see infra* notes 173-75.

to treatment provided by the state.[171] Nor has it recognized the constitutionality of a state's purely beneficent limitation of liberty. That is, the Court has refrained from deciding whether the state, in the exercise of *parens patriae* powers, may limit liberty in order to impose treatment solely for the benefit of the non-dangerous recipient.[172] Thus, limitations on liberty interests at stake in representative payment for purely beneficent reasons may or may not comply with constitutional limitations on the exercise of *parens patriae* powers announced in the civil commitment context.

However, the Supreme Court compelled the restoration of liberty where it has been restricted for the purpose of treatment where no treatment was provided. In *O'Connor v. Donaldson*, the Supreme Court held that the state could not, consistent with due process, confine without his consent a non-dangerous mentally ill patient who was provided no treatment for his mental illness.[173] If the *Donaldson* reasoning were applied to representative payment, incapable beneficiaries found to need payee assistance have no constitutional claim to such assistance. They have only a claim to regain control over their benefits if a payee is not provided. When SSA complies with new statutory limitations on the suspension of benefits, it will restore autonomous control over bene-

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171. *Id.* While the Supreme Court has never subscribed to a constitutional right to treatment, lower federal courts have. *See, e.g.*, Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), *supplemented by* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *supplemented by* 68 F.R.D. 589 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975). *But see* Burnham v. Dept. of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

172. The majority in *O'Connor v. Donaldson* explicitly stated "there is no reason now to decide whether . . . the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." 422 U.S. at 573. As Justice Burger observed in his concurring opinion: "[n]or can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment." *Id.* at 589.

173. 422 U.S. 563. However, the Court left open the question whether the state may confine a non-dangerous person for the purpose of treating his mental illness, if treatment *is* provided. Other cases suggest that the state assumes some affirmative obligations to persons whom it has deprived of liberty, even where the deprivation is intended to further the public, rather than their own, interests. These cases hold that persons in the custody of the state must be provided benefits such as medical care, to which they would not otherwise be entitled. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1975) (intentional indifference to serious medical needs of prisoners constitutes cruel and unusual punishment). Similarly, in Youngberg v. Romeo, 457 U.S. 307, 324 (1982), the Court held that mentally retarded, involuntarily committed inmates of state institutions for mentally retarded people who were dangerous to themselves and others have a Fourteenth Amendment right to reasonably safe conditions and freedom from bodily restraint. *Cf.* DeShaney v. Winabego County, 489 U.S. 189 (1989). *See generally* CHARLES FRIED, RIGHT AND WRONG (1978); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

fits when it cannot provide payee assistance and thus comply with *Donaldson* requirements. Even though SSA continues to deny assistance where it has determined assistance is needed,[174] it will violate no constitutional principle in doing so.[175] Thus, SSA's procedures do not gain legitimacy by conforming to constitutional requirements of beneficence. The Constitution to which it conforms contains no such value preference.

2. Donaldson *as a Basis for Legitimacy: Some Problematic Assumptions*

Like the *Mathews v. Eldridge* due process analysis, it can be argued that the autonomy—beneficence concept underlying *Donaldson* cripples the Court's ability to resolve the problems presented by people who function differently. It fails for several reasons to answer questions about what their relationship to the government and those around them should be. First, in *Donaldson* the Court saw the issue posed by civil commitment as a choice between two inconsistent conditions: personal liberty outside a mental institution and treatment within it. Like paternalism in the representative payee program, the rationale for limiting liberty through civil commitment is, at least in the case of a non-dangerous person like Donaldson, the provision of assistance in the form of treatment for that individual's personal benefit. As the Court of Appeals for the Fifth Circuit held in *Donaldson*,

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174. Congress has approved of the indefinite suspension of benefits for certain Title XVI beneficiaries, minors and legal incompetents, however. It can be argued that the failure of the state to provide assistance for which liberty interests are restricted requires the restoration of those interests. However, it can also be argued that the interests at issue are property interests in statutory benefits, entitlement to which is conditioned by the statute on the availability of a payee to serve these particular beneficiaries. 42 U.S.C.A. §§ 405(b) (West 1991), 1383(a)(2)(A)(ii) (West 1992); POMS § GN 00502.010A (1991).

175. Application of the *Donaldson* rationale to SSA's practice of suspending the payment of social security benefits where a payee is needed, but not available, would hold such practice an unconstitutional deprivation of the beneficiary's liberty interest in controlling the expenditure of his or her entitlements. Though Donaldson's original complaint asserted an affirmative right to treatment under the Constitution, the Supreme Court decided the case on a right to liberty rationale, not a right to treatment rationale. The Court of Appeals for the Fifth Circuit had affirmed the district court's judgment for Donaldson in an opinion holding that when the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided. O'Connor v. Donaldson, 493 F.2d 507, 521 (5th Cir. 1974). The Supreme Court expressly declined to decide such difficult issues surrounding the claim of a right to treatment and found that the case presented a single relatively simple question concerning the right to liberty. *O'Connor*, 422 U.S. at 573.

> [W]here, as in Donaldson's case, the rationale for confinement is the parens patriae rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided. . . . "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamental of due process."[176]

The Supreme Court rejected this conclusion. It reasoned that since treatment had not been provided, there was no justification for continued confinement and Donaldson should have been released. It refused to adopt the Fifth Circuit's holding that, while confined, Donaldson had a constitutional right to treatment.[177] As the Court saw it, treatment not provided cannot vanquish liberty in the zero sum game, and therefore liberty interests win out.

Had the Supreme Court not parsed the issue into conflicting values, it might have better grasped the complexity of the situation posed by persons whose mental functioning is unusual. While Donaldson had refused psychiatric medication and electroshock therapy while institutionalized, he had sought other treatment—occupational therapy, recreational and grounds privileges and psychiatric consultation—all of which had been denied. Donaldson's original complaint in the district court was a class action, filed while he was still a patient in the hospital, seeking injunctive relief requiring the hospital to provide adequate psychiatric treatment to involuntarily confined patients, including himself.[178] While Donaldson wanted his liberty in the form of grounds privileges and eventually placement with a community halfway house program, he wanted appropriate treatment as well.[179] The state's interest in confining Donaldson was never clarified. Since the jury had found Donaldson not dangerous to himself or others, the Supreme Court speculated that the state's only motivations for confining him would have been to cure his mental illness or to provide him a better living standard than he would be able to achieve for himself.[180] Thus, both Don-

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176. 493 F.2d at 521 (quoting Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971)).

177. *Donaldson*, 422 U.S. 571, 573 (1975).

178. *Donaldson*, 493 F.2d at 512.

179. As noted in BRAKEL ET AL., *supra* note 10, at 27-28 (footnote omitted):

> The real problem with institutionalization . . . is not the railroading of unwilling individuals but almost the opposite. In 1971, for example, although around four million Americans received treatment for mental illness . . . another two million were turned away because of the lack of treatment personnel to handle them. From this perspective, the legalization and criminalization of civil commitment are an exercise in irrelevance at best.

180. 422 U.S. at 575. The majority of the Court in *Donaldson* rejected the idea that the

aldson and the state apparently agreed on his need for treatment and the desirability of providing it, but these mutual interests in the provision of assistance were never recognized by the Court. Judicial remedies effectuating such interests might have been possible if the Court had not been trapped in the autonomy-beneficence analysis underlying the paternalism of civil commitment. As it was, the Court felt compelled to make a choice between liberty interests and treatment interests and chose the former, fearing perhaps that finding affirmative rights to beneficence and treatment in the Constitution would burden the courts and the state with determinations about the constitutional adequacy of treatment and the adequacy of the state's efforts to provide it.[181]

Second, like *Mathews*, the Court in *Donaldson* assumed that mental illness, like disability and capability, is a fact that can be discovered by experts, although the Court was wary of Donaldson's diagnosis of paranoid schizophrenia.[182] The Court held that

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[183]

This analysis explicitly assumes that mental illness is a thing that exists, to be defined and discovered.[184] The Court only doubted the ability of present day psychiatrists to do that well.[185] Yet, as other commenta-

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state could constitutionally confine a non-dangerous person involuntarily simply to provide custodial care. *Id.* at 573-76. Justice Burger disagreed in his concurring opinion, reasoning that because much mental illness cannot be treated, the state might well provide a sheltered, custodial environment to mentally ill people unable to function in society. *Id.* at 582-85.

181. *But see* 422 U.S. at 574 n.10; Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974).

182. While the majority opinion referred several time to Donaldson's "supposed mental illness" and Justice Burger had some doubts about the reliability of psychiatric diagnosis in general, both assume that mental illness is a condition that can be discovered and proved by relevant evidence. *See* 422 U.S. 563.

183. *Id.* at 575. The Court observed that the state may not confine the mentally ill merely to ensure them a living standard superior to what they enjoy in the private community. *Id.*

184. *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-47 (1985); Martha Minow, *When Difference Has Its Home: Group Homes For the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 120-22 (1987).

185. *See* Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974) (*cited in* 422 U.S. at 584 (Burger, J., concurring)).

tors have pointed out, mental illness can be viewed simply as a construct necessary for the definition of ourselves as mentally healthy.[186] Or, it can be seen solely as a mechanism for controlling certain behavior.[187] According to this view, mental illness does not exist independent of the power to act in accordance with a socially purposive definition of it. It is the power to designate some behaviors as "illness" and to legally subject those who engage in them to remediation that defines mental illness for legal purposes. If the Supreme Court in *Donaldson* had been willing to consider the idea that mental illness is not a discoverable fact, it might have been able to entertain this fundamental question: for what social purposes is it rational and legitimate to impose conditions regarded as treatment upon people who engage in certain behaviors in order to change those behaviors? Misunderstanding the question, the Court could not give an answer.

Third, the *Donaldson* Court misconceived the autonomy that due process protects. While the *Mathews* Court failed to recognize the relational nature of self-conceived identity and control, the *Donaldson* Court failed to understand the difference between abstract liberty as freedom from external constraints, like confinement in an institution, and Donaldson's inability to experience liberty as self-control. Because of internal constraints on his behavior resulting from his delusions, Donaldson's autonomy interest lay in the elimination of such internal constraints through the treatment he sued to obtain. Misconceiving the liberty at stake to be only the abstract concept of physical freedom, the Court again missed an opportunity to adjudicate Donaldson's real and complex interests in his relationship to the state hospital. Had the Court announced a due process principle that effectuated Donaldson's interest in a more particular, subjective and functional concept of autonomy, SSA's compliance with that principle might have legitimated its own efforts to balance interests in such autonomy with other interests. As it is, compliance with *Donaldson's* requirements protecting only abstract freedom from external restraint fails to promote either interests in actual autonomy or beneficence.

Finally, the Court in *Donaldson* did not deal expressly with the fundamental question underlying its liberty versus treatment analysis:

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186. *See* RONALD D. LAING, THE DIVIDED SELF (1969); RONALD D. LAING, THE POLITICS OF EXPERIENCE 114-15 (1967); THOMAS SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT 32-37 (1961).

187. REISNER & SLOBOGIN, *supra* note 47, at 363-64. AUGUST B. HOLLINGSHEAD & FREDERICK REDLICH, SOCIAL CLASS AND MENTAL ILLNESS (1958).

whether the Constitution compels the state to provide *any* basic services to a citizenry that has consented to be governed, as a quid pro quo for its existence. If a state does not owe its citizens education, housing, subsistence, health care or psychiatric treatment, does it have an obligation to provide any affirmative benefits in exchange for its authority to govern? It is a thorny problem that has long occupied scholars and is beyond the scope of this article.[188] Nevertheless, a concept of the Constitution as a blueprint for decisionmaking in society, legitimated by its popular acceptance, rather than as a contract for an exchange between citizens and state might yield an issue different than the one the Court believed it was required to answer in *Donaldson.* Then the constitutional issue might have been: whose decisions about how the state will assist certain individuals counts?

V. THE PARTICIPATORY JUSTICE MODEL: A PROPOSAL FOR NEGOTIATED RULEMAKING

If, with congressional acquiesence, the representative payment program continues to be a relatively inexpensive, though not fully effective, means of providing management assistance to social security beneficiaries, an administrative structure should be created within SSA that can perform more effectively both the adjudicatory and social service functions required by representative payment. Moreover, some legitimating basis for the selection of values upon which that administration will be premised must be found.[189]

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188. See discussion *infra* note 228. The liberal tradition is grounded in the notion that individuals have a natural right to liberty which they consent to relinquish in part to the state, in return for the benefits that only the state can provide. TREATISES II, sec. 21; THOMAS HOBBS, THE LEVIATHAN ch. 14 (Crawford B. MacPherson ed., 1972) (1651); JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT AND END OF CIVIL GOVERNMENT ch. 8 (1690); RICHARD EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7-18 (1985). *See* Farrell, *supra* note 4 (discussing the concepts of autonomy and beneficence put in conflict by paternalism).

189. Congress may not have carefully considered the need for, and full implications of, assuming responsibility for the exercise of *parens patriae* powers on the federal level by an administrative agency. 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 and protective services programs. The state programs are in place or could be funded or developed to protect social security benefits as well as other interests of low income, vulnerable people. If SSA were to refer such beneficiaries to state guardianship proceedings as the exclusive means of determining a beneficiary's competence to handle financial affairs, including social security benefits, SSA could then continue to perform only its functionary role in paying benefits; a role to which it is well suited. It is true that many states do not have adequate public guardianship and other social service programs to assist fragile individuals whose assets are too

A fundamental legitimating principle underlying representative democracy is that affected individuals participate through their representatives in making the policy choices according to which they will be governed.[190] This basis for legitimacy may be provided to the representative payee program through negotiated rulemaking. Were SSA to initiate negotiated rulemaking to promulgate standards and procedures governing representative payment, the legitimacy of the resulting rules would rest on the participation of affected interests in the process by which the rules were created, not on administrative expertise, electoral accountability or enactment of the popular will. While negotiated rulemaking would require SSA to deal with difficult questions of interest, representation, issue definition, resource equality and consensus, these issues are no more difficult than the policy and legitimacy issues it already faces. Furthermore, negotiated rulemaking on representative payment may provide a better institutional process for the development of rules than could be provided by either Congress, the courts or SSA alone. Thus, I propose that SSA adopt a model of participatory justice to legitimate its administration of the representative payee program.

A. The Background of Negotiated Rulemaking

Negotiated rulemaking is a process that permits interested parties who will be affected by an agency rule to participate in the detailed formulation of the rule before it is published in the *Federal Register* as a proposed rule. The Administrative Conference of the United States (ACUS) has recommended that agencies consider using this procedure as a supplement to the informal rulemaking process called for by section 553 of the APA,[191] and Congress has recently enacted a bill to establish a framework for the conduct of negotiated rulemaking by federal agencies.[192] To date, most negotiated rulemaking has been initi-

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meager to cover the cost of guardianship proceedings and fiduciary fees. But Congress could consider funding state efforts to develop and monitor adequate social services for such beneficiaries as an alternative to SSA undertaking to provide those services through representative payment.

190. *See generally* Ely, *supra* note 68, at 87; Stewart, *supra* note 73, at 1711-1813.

191. *See generally Negotiated Rulemaking Act of 1987: Hearings on H.R. 3052 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 35 (1988) (testimony of Marshall L. Breger, Chairman, Administrative Conference of the United States).

192. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C.A. §§ 581-590 (West Supp. 1992)). *See generally* H.R. REP. No. 461, 101st Cong., 2d Sess. (1990) (discussing the Negotiated Rulemaking Act of 1990); Alternative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (ADR Act).

ated by agencies without congressional authorization or mandate. Among the agencies that have conducted negotiated rulemaking proceedings are the Environmental Protection Agency (EPA), the Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration (OSHA).[193]

Negotiated rulemaking is the most current manifestation of a long term interest of administrators and legal commentators in involving the public in administrative decisionmaking.[194] It is modeled, in part, on litigation settlements and the collective bargaining process.[195] In the belief that informal notice and comment rulemaking often results in polarized positions that are ultimately resolved in expensive, time consuming litigation, some administrative law scholars have proposed a preliminary rulemaking step in which persons affected by the rule participate in policy formation, along with the agency. The premise of negotiated rulemaking is that participation in policy formation results in compromise rather than polarization and that it produces better rules faster and cheaper.

An agency considering negotiated rulemaking with regard to a set of issues must first evaluate the feasibility of negotiating a rule, identify affected parties and organizations, and propose a set of issues to be negotiated.[196] Typically, the agency designates a "convenor" to identify

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193. The EPA used negotiated rulemaking to promulgate rules pertaining to vehicle emissions, *see* 50 Fed. Reg. 36,732 (1985) (codified at 40 C.F.R. pt. 66), and pesticide exemptions, *see* 51 Fed. Reg. 1,896 (1986) (codified at 40 C.F.R. pt. 166). The FAA has used negotiated rulemaking to develop flight and duty time regulations for airline flight crews. *See* 50 Fed. Reg. 29,306 (1985) (codified at 14 C.F.R. pts. 121, 135). OSHA has used negotiated rulemaking to develop a proposed standard for occupational exposure to benzene, but the negotiations did not produce a consensus and were abandoned. *See* United Steelworkers of Am. v. Rubber Mfrs. Ass'n, 783 F.2d 1117 (D.C. Cir. 1986). OSHA has also used negotiated rulemaking to develop a standard to protect farm workers which similarly failed to produce a consensus rule. *See* Henry H. Perritt, Jr., *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 PEPP. L. REV. 863, 896 (1987). See also Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985).

194. Chisman Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 SW. L.J. 731 (1970).

195. *See generally* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

196. Under 5 U.S.C.A. § 583, an agency is to consider the need for a rule, "whether . . . there are a limited number of identifiable interests that will be significantly affected by the rule; [whether] there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who . . . can adequately represent the interests identified . . . [and who] are willing to negotiate in good faith to reach a consensus. . . ." 5 U.S.C.A. § 583 (West Supp. 1992).

affected parties and interests and evaluate the feasibility of negotiating the rules.[197] The 1990 Negotiated Rulemaking Act[198] requires that the agency consider the convener's report and publish notice in the *Federal Register* announcing the intention to establish a rulemaking committee, the subject of the rule to be developed, a list of the interests affected, a list of persons to represent those interests, a proposed agenda, a target date for publication of a proposed rule, and a description of the administrative support to be made available. The notice is intended to solicit comments on the proposal and invite applications for additions to the committee.[199] In the past, the initiating agency has provided funds to participating parties to finance research and hire staff to support their negotiation efforts. In addition, the agency will usually agree to publish as a proposed rule, the consensus rule formulated through negotiations.[200] If the convenor is successful in assembling a balanced committee, it may conduct pre-negotiation training sessions and oversee the use of funds provided by the agency to permit the parties to acquire necessary information and technical advice, and to communicate with their constituents regarding their positions in the negotiations.[201]

The goal of the committee's deliberations is to arrive at a consensus rule which all parties, including the agency, can support or, at least, which no party will oppose.[202] The agency may participate, as it has in some environmental rulemaking proceedings, as a kind of disinterested referee protecting the public interest in negotiations between affected private interests. Alternatively, the agency may actively participate as

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197. Sometimes such a convenor has been a disinterested person within the agency, and sometimes it has been a private organization with whom the agency contracts. *See id.* § 583(b).

198. *See supra* note 5.

199. 5 U.S.C.A. § 584.

200. 1 C.F.R. § 305.82-4 recommendation 4 (1992). DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 97-105 (1990) [hereinafter SOURCEBOOK]. Title 5 U.S.C.A. § 583(a)(6) and § 583(a)(7) provide that the agency shall consider whether "the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and . . . [whether] "the agency, . . . will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment."

201. *See, e.g.*, Environmental Protection Agency Notice of Open Meeting of the Negotiated Rulemaking Advisory Committee on New Source Performance Standards for Residential Wood Combustion Units, 51 Fed. Reg. 18,661, 23,468 (1986); SOURCEBOOK, *supra* note 200, at 186-96 (organizational protocols).

202. Section 582 defines consensus as "unanimous concurrence among interests represented on a negotiated rulemaking committee . . . unless such committee . . . agrees to define such term to mean a general but not unanimous concurrence; or . . . agrees upon another specified definition." 5 U.S.C.A. § 582(2) (West Supp. 1992).

an interested party to ensure that the proposed rule is consistent with statutory requirements and is administratively feasible.[203] Because the agency is involved in reaching a consensus, the parties can normally expect that the proposed rule will be put out for comment, and because most of the interested parties were involved, they can expect that the final rule will be very similar to the proposed rule unless the agency receives unanticipated public comments or extraordinary circumstances arise.[204] In several instances, negotiated rulemaking failed to produce a consensus, and the agency proceeded with informal rulemaking.[205]

Advocates of negotiated rulemaking maintain that the overall expense entailed in rulemaking, including subsequent litigation, can be reduced through its use.[206] Interested parties can often avoid duplicative research and fact finding by cooperatively developing information necessary to the settlement of policy issues; there are fewer incentives for parties to develop excessive information in order to position themselves for subsequent litigation; positions are not polarized as they may be in regular, informal rulemaking proceedings; negotiation under a deadline produces consensus rules faster than informal notice-and-comment rulemaking; and parties agreeing to consensus rules are less likely to challenge the rule after promulgation, thus reducing the likelihood of expensive litigation in the future. Furthermore, advocates of negotiated rulemaking contend that the process produces "better," rules in the sense that they are based on a process that takes empirical information made available through the process into account. But, perhaps most importantly, the negotiation process also takes policy positions of interested parties into account which is something that agency dominated notice-and-comment rulemaking and litigation have not done well. This

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203. The agency may act as a direct participant in the negotiations with a veto power over any consensus rule, a power inherent in its legislative authority to promulgate the final rule. Susskind & McMahon, *supra* note 193, at 158. The Negotiated Rulemaking Act makes such participation necessary to its model and provides so in § 586(b):

> The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

5 U.S.C.A. § 586(b) (West Supp. 1992). Importantly, the agency must assure that the rules proposed can be effectively administered by the agency. For a discussion of several recent examples of SSA's failure to do so, see MARTHA DERTHICK, AGENCY UNDER STRESS 3-7, 22-48 (1990).

204. Negotiated Rulemaking Act, 5 U.S.C. § 581.

205. *See, e.g,* United Steelworkers of Am. v. Rubber Mfrs. Ass'n, 783 F.2d 1117 (D.C. Cir. 1986).

206. *See, e.g.*, Suskind & McMahon, *supra* note 193.

quality of negotiated rulemaking adds legitimacy to the resulting rule based on notions of pluralistic, participatory government, respect for affected interests and agency expertise.

B. Negotiating Standards and Procedures for Representative Payment

SSA has authority to engage in informal negotiated rulemaking with regard to the standards and procedures for determining the need for representative payment as well as for appointing and monitoring payees.[207] The Administrative Conference and the Negotiated Rulemaking Act of 1990 have posited several preconditions for the success of negotiated rulemaking, many of which seem possible in the case of the negotiating rules regarding the representative payee program.[208]

First, interested parties must believe that they have more to gain from negotiating a consensus rule than from pursuing more adversarial alternatives, such as lobbying Congress or bringing lawsuits. This perception must be founded on a belief that SSA is committed to implementing the final agreements or at least to the publication of the consensus rule in the *Federal Register* as a proposed rule. It also depends on a belief that the rule, if finally adopted, can be effectively enforced by SSA, even if challenged in court by those who did not participate in the negotiations. For example, if SSA were to propose rulemaking around the question of payee accounting, groups interested in the *Jordan v. Schweiker*[209] case would have to believe that they have more to gain from cooperating with SSA and other interested parties in devel-

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207. SSA retains authority to make rules regarding accounting requirements applicable to payees appointed for beneficiaries who are not members of the *Jordan* class. The orders of the district court in Jordan v. Schweiker, No. CIV-79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, Courts file) are binding only on parties to the action. If the description given by the Court of Appeals of the plaintiff class in *Jordan* is accurate, the class consists of "all recipients of Social Security benefits (Title II) and Supplemental Security Income (Title XVI) who then [in September 1980] had a representative payee or had such a payee within six years prior to the filing of the action." Jordan v. Bowen, 808 F.2d 733, 734 (10th Cir.), *cert. denied*, 484 U.S. 925 (1987). If it were to commence negotiated rulemaking, SSA might avoid some of the expenses and delays of traditional informal rulemaking and possibly establish a rule acceptable to both *Jordan* class members and beneficiaries who are not members of the class. Since many payees are appointed to handle the funds of elderly people and children, the payees to which the *Jordan* order applies may have dwindled significantly since 1980.

208. 5 U.S.C.A. § 583(a) (West Supp. 1992); 1 C.F.R. § 305.82-4 recommendation 4 (1992). *See also* Harter, *supra* note 195, at 42-51; Susskind & McMahon, *supra* note 193, at 138-139; 1 C.F.R. § 305.85-5 recommendation 5 (1992).

209. Jordan v. Schweiker, No. CIV-79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, Courts file).

oping an acceptable, efficient, cost effective means of monitoring payees through rulemaking, rather than through the enforcement of the existing *Jordan* order or through the challenge of a new agency rule governing accounting for non-class members. SSA must also be convinced that a consensus rule regarding representative payee procedures will be more administratively efficient in the long run, avoiding the time and expense of protracted informal rulemaking and post-enactment litigation.

Second, it must be possible to choose a set of not more than twenty to twenty-five negotiators who can effectively represent various affected interests.[210] No party or small group of parties should have so much power that they can dominate the negotiations. In the case of representative payment, there are a number of organizations whose members will be affected by rules regarding payee accounting and other procedures governing the representative payee program. As in other contexts, there may be questions about the extent to which those organizations can represent their constituencies on the issues involved and the extent to which they can represent the universe of interests affected by the proposed rule.[211]

There is considerable debate about whether negotiated rulemaking is an appropriate process to accommodate the diffuse interests of large, unorganized groups, especially if their membership is poor.[212] In its report on the Negotiated Rulemaking Act, the House Judiciary Committee noted special concern about the ability of organizations representing social security beneficiaries adequately to represent all affected interests, particularly poor people, in negotiations.[213] It suggested that special financial and educational resources may be necessary in such

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210. 5 U.S.C.A. § 585(b) (West Supp. 1992). Harter, *supra* note 195, at 46. Section 583(a)(3)(A) and (B) requires only that the committee be composed of persons who "can adequately represent the interests identified . . . [and] are willing to negotiate in good faith to reach a consensus on the proposed rule." 5 U.S.C.A. § 583(a)(3)(A), (B) (West Supp. 1992).

211. Susskind & McMahon, *supra* note 193, at 157 & n.119.

212. *See, e.g., Negotiated Rulemaking Act of 1987: Hearings on H.R. 3052 Before the Subcomm. on Administrative Law and Government Relations of the House Judiciary Comm.*, 100th Cong., 2d Sess. 55-71 (1988) (Statement of Eileen Sweeny), National Senior Citizens Law Center. Ms. Sweeny expressed concern that poor people represented by organizations with few funds and located away from Washington, D.C. would not be adequately represented in committees and subcommittees, that congressionally granted rights would be undermined through negotiated rulemaking involving unsympathetic interests, and that "consensus rules" could be arrived at with less than unanimous support from the negotiating committee. *See generally* Allan Ashman, *Representation for the Poor in State Rulemaking*, 24 VAND. L. REV. 1 (1970).

213. H.R. REP. No. 146, 101st Cong., 2d Sess. 10 (1990).

situations to prevent such groups from becoming overpowered by better informed and better endowed interests.[214] These special resources might include training in negotiation skills, as well as the development of relevant information and payment of expenses involved in participation.[215] While special resources may be necessary, this need alone should not disqualify poor people's organizations from participating in negotiated rulemaking where it is otherwise appropriate. The Negotiated Rulemaking Act itself expressly provides for agency funding to defray the costs of participation in rulemaking.[216]

In addition to the plaintiff classes in lawsuits such as *Jordan* and *Briggs*, organizations whose members are mentally or physically impaired may wish to participate in order to represent those constituents who receive social security benefits.[217] Other organizations, which usually include within their membership the families and friends of disabled people, might include the Association for Retarded Citizens and the Mental Health Association of America. Organizations of social security beneficiaries, such as the American Association of Retired Persons (AARP), only some of whose members may be mentally or physically impaired, may want to participate in representative payee rulemaking as well.[218] Similarly, welfare rights organizations whose

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214. *Id.*

215. For early recommendations that agencies develop and pay for the participation of poor people in agency rulemaking, see Arthur Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH L. REV. 511, 523-27 (1969).

216. Section 588(c) provides that:

> members of a negotiated rulemaking committee shall be responsible for their own expenses . . . except that an agency may . . . pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if . . . such member . . . lack[s] . . . adequate financial resources to participate . . . [and] the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

5 U.S.C.A. § 588(c) (West Supp. 1992).

217. Counsel in *Jordan*, No. CIV.-79-994-W (W.D. Okla. Mar. 17, 1983) (LEXIS, Genfed library, court's file), and Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989), may or may not have an ongoing relationship with client groups that would permit their participation in negotiated rulemaking representing such clients. To the extent that the courts have retained jurisdiction in these cases, counsel for the class may have an ongoing responsibility to participate in matters affecting the class regarding the subject matter of the suit.

218. For example, the membership of the AARP is largely composed of persons entitled to social security retirement benefits. While most of its members do not receive their benefits through a representative payee, its members' interest in controlling and/or having assistance in managing their benefits is at issue in the rulemaking. AARP has sponsored local projects providing representative payees for beneficiaries in need of them and would thus have valuable information and experience to bring to the negotiating table. *See* Farrell, *supra* note 8, at app. II. While these two interests, those of beneficiaries and payees, may be seen as antagonistic on some issues, the value

members are recipients of SSI benefits may be appropriate organizations to participate in negotiated rulemaking concerning payee issues. Organizations representing homeless people may be especially interested in the development of rules which serve the interests of this particularly vulnerable group whose members increase when social security benefits are suspended for want of available payees.[219] Alternatively, legal services agencies that have traditionally represented such interests may be appropriate organizations to participate on behalf of welfare beneficiaries who are eligible clients under the Legal Services Corporation Act. Since almost all individual members of the public are potential social security beneficiaries, either as retirees, disabled persons or indigents, other groups whose members are only thus indirectly affected by payee rules may assert an interest in participating. Public and private organizations, including state public guardians, Guardian, Inc., and Community Advocates, that have provided payee services in the past, might also be included. Other government agencies such as the Office on Aging and the VA could be invited to participate or consult in the negotiations in order to provide their expertise and perspective. The convenor would have to determine how many organizations with directly affected members were willing to participate and then determine which organizations with indirectly affected members to include, if any. If there are too many groups representing affected interests, the convenor may consider participation by coalitions of such groups.

The subject of the rulemaking should involve several issues so that the parties can trade them off with each other. In keeping with negotiation theory, it is important that the issues presented for resolution be framed in terms of shared objectives. If the situation is perceived as a game in which one party can win only at the expense of another party, a negotiated consensus will reflect only the relative strength of the parties' bargaining positions. Thus, weak parties will be able to exact little from the negotiations, while strong parties will gain at the expense of their opponents. If, however, the situation is perceived as a market in which interested parties trade items that they value differently, each

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of having the experience of the AARP represented would seem to outweigh the disadvantages of such a conflict of interest, particularly in light of the fact that beneficiary and payee interests will be represented separately by other groups.

219. When similar efforts were made in the 1960s and 1970s to include representatives of poor, unorganized and inarticulate people on community action boards, questions arose about the ability of these spokespersons to truly represent their constituents' interests because the experience of acting as a spokesperson changed their own perspectives and gave representatives a personal interest in participation. Such issues may well arise in negotiated rulemaking as well.

gains through the exchange.[220] In order for this kind of "integrative bargaining" to occur there must be a number of issues or subissues which the parties may trade according to their relative importance to the parties.[221] For example, if, in the case of payee rulemaking, an issue were framed as whether to require universal annual accounting, the situation might be seen as one in which SSA could win (by requiring less than universal annual accounting) only if the beneficiaries lose their right to such accounting announced in the *Jordan* case.[222] However, payee rulemaking could be perceived as seeking the most cost efficient, effective, fair and accurate means of protecting the interest of beneficiaries in the expenditure of benefits. So conceived, interested parties and SSA share fundamental values: protecting the interest of beneficiaries in the expenditure of their funds. And they seek a common goal: the means of accounting that most efficiently and effectively furthers that interest. This issue breaks down into subissues or items about which the parties may differ, but which they may trade in an effort to construct a final rule that they regard as better than a rule produced by Congress, SSA acting alone, or the courts. Similarly, subissues concerning payee accounting which a rulemaking committee

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220. ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1-2 (1979).

221. As observed by Professor Harter:

> The prime benefit of negotiations is that the parties affected by a decision can identify the issues involved, scale their respective importance, trade positions, and work out novel approaches in an effort to maximize their overall interests. Parties may yield on issues that have lower priority to improve their position on issues that have higher priority. This scenario, of course, assumes that there are multiple issues to trade. Negotiations are likely to be difficult when there is only one issue with a binary solution involved in the decision. In such a situation, because there will be a clear winner and a clear loser, there would be virtually nothing to negotiate. Thus, a regulation raising only a singe issue, or even a very few issues, is an inappropriate candidate for negotiation. Very few regulations, however, involve a singe or only few issues. Most regulations raise a great number of issues suitable for discussion.

Harter, *supra* note 195, at 50.

222. In his dissent in *Goldberg v. Kelly*, Justice Black saw a zero sum game played by disability beneficiaries and applicants, where the cost of retaining ineligible disability beneficiaries on welfare roles while due process is provided ensures that "many [needy persons] will never get on the roles, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility." 397 U.S. 254, 279 (1970). It was also noted in *Goldberg* that most ineligible beneficiaries could not be made to repay benefits they received erroneously, and therefore, keeping such beneficiaries on the welfare roles until pre-termination hearings were conducted increased the overall costs of the program. *Id.* at 278. Moreover, it can be argued that since the resources available for the welfare program as a whole are limited, every dollar spent on due process procedures (the administrative cost of hearings) must be subtracted from the dollars that can be spent on benefits.

might consider include which payees should account, what kind of accounting should be required, how often payees should make accountings, what kind of verification and auditing should be done by SSA, what new accounting rules should go into effect, and the like. In addition, SSA might propose rulemaking with regard to related issues such as procedures and sanctions for payee misuse. Such topics would provide more than enough issues to permit parties to negotiate their differences through trades.

The issues presented for negotiation must be apparent to the parties. They must understand the importance of the issues and be ready to address them. There would seem to be little doubt that, at least with regard to the issue of payee accounting, some individuals and organizations who believe they are affected by representative payee policies are aware and understand the importance of the issue. Their participation in the legislative and judicial processes around the issue would indicate that they are ready to address it. Given the *Holt* and *Briggs* suits the same can be said for other payee issues, such as the procedures for the selection of payees, handling claims of misuse and suspension of benefits.

Despite the fact that the process requires differing interests with regard to multiple issues, there must be some basic agreement about the values at stake in the controversy. If the parties hold conflicting beliefs about fundamental values at issue in the rulemaking, they may have little success in resolving policy disputes.[223] In the case of procedures for determining the need for and monitoring the performance of representative payees, there would seem to be a large area of agreement between those who would require more and less procedures. For example, both the plaintiffs in the *Jordan* case and SSA would agree that the interests of beneficiaries in the expenditure of their funds for their benefit is the ultimate value to be pursued. Furthermore, they would agree that the least expensive, most effective means of protecting those interests should be chosen so that beneficiaries' interests can be enhanced in other ways. The means, rather than the ends, of the debated procedures is the issue to be resolved through rulemaking. The parties and SSA may give different weight to individual autonomy, dignity, social responsibility, efficiency, accuracy and fairness in devising appropriate representative payee procedures, but they would not seem to disagree that those are the values to be reconciled and maximized.

223. Harter, *supra* note 195, at 49; Susskind & McMahon, *supra* note 193, at 139.

Finally, in order to prevent strategic delay, a deadline for rulemaking should be imposed to avoid parties using delay as a strategy for furthering their interests.[224] Thus, a target date for rulemaking must be set by the agency when it announces that it intends to engage in negotiated rulemaking under the new Negotiated Rulemaking Act of 1990.[225]

SSA's representative payee program suffers as much from having no meaningful standard of need for payeeship as it does from having inadequate procedures to apply a standard. However, questions may arise over whether negotiated rulemaking is as appropriate a process for rulemaking with regard to a standard of competence as it is with regard to procedures for applying the standard, selecting payees and monitoring their performance. Questions of procedures involve both the interests of persons likely to come under payeeship and those likely to serve as payees, so it is easy to see their contrasting interests as ones that could be traded to arrive at a consensus rule. There are no similarly opposed interests with regard to a standard of incapability, and the procedural and substantive issues surrounding payeeship are not easily separated. Nevertheless, persons likely to serve as payees, family members, voluntary organizations and others, *are* affected by the standard that is chosen to measure mental and physical functional ability for this purpose, as well as procedures for its application. A low functional threshold means SSA will not appoint payees in many cases in which some people might think them appropriate to the facilitation of their relationships. A high threshold would mean that payees will be appointed more often. The standard itself should take into account some of the complexities of the relationships to which, and the circumstances in which, it will be applied. These can best be presented by representatives of the different interests affected by those relationships, and efforts should be made to accommodate the objectives of as many such relationships as possible through negotiating an acceptable standard for the needs of payee.

C. Negotiated Rulemaking and Legitimacy

While a thorough exploration of the jurisprudential and philosophical underpinnings of a claim to legitimacy based on participation in administrative rulemaking is beyond the scope of this article, it is worth noting the basis for such a claim in traditional libertarian political the-

224. Harter, *supra* note 195, at 47.
225. 5 U.S.C.A. § 584(a)(5) (West Supp. 1992).

ory and commenting on its relationship to some critiques of the liberal legal tradition. The contractual, libertarian premises upon which our constitutional democracy is based, hold that government may legitimately interfere in private lives because individuals, the original repositories of natural rights and liberty, have collectively agreed that it should be so.[226] Thus, government is legitimate when autonomous individuals have collectively consented to be so governed in exchange for certain benefits.[227] Although we cannot demonstrate that SSA discretion has been consented to by the general population in any meaningful way through either legislative directives or executive accountability, SSA's discretionary intrusions upon the lives of social security beneficiaries could be seen as based in consent if those affected by such agency action, or their representatives, have agreed through participatory rulemaking to a consensus rule establishing the procedures through which SSA will exercise its discretion. Participation by affected interests might not provide a basis for legitimacy where an agency is charged with protecting the public interest. As in the case of much economic regulation, participation and consent of special interest groups affected by specific industry regulation can be regarded as cooptation and a corruption of the independence and objectivity expected of administrative agencies, rather than as a legitimatizing factor.[228] However, where as here, an agency is charged with acting paternalistically in the interest of beneficiaries for their own good and not for the good of third parties, including the general public, the participation and consent of beneficiary representatives provides a good second best solution to the problem of legitimacy usually based on accountability to the electorate.

In his book, *Democracy and Distrust*, Professor John Ely puts forward the thesis that the Constitution is largely concerned with the process by which substantive values are legitimately chosen and not with

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226. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 330 (1969); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (R. Heffner ed., 1956); EPSTEIN, *supra* note 188, at 7-18; Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 62-63; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 10 (1971). *But see* LAWRENCE H. TRIBE, CONSTITUTIONAL CHOICES 5-6 (1985).

227. HOBBES, *supra* note 188, at 189-201; JOHN LOCKE, TWO TREATISES OF GOVERNMENT 300 (Peter Laslett ed., 2d ed. 1967).

228. *See generally* Louis L. Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201, 252-53 (1937); George J. Stigler, *The Process of Economic Regulation*, 17 ANTITRUST BULL. 207 (1972).

establishing substantive values themselves.[229] Our excursion through the due process analysis supplied by *Mathews v. Eldridge* and *O'Connor v. Donaldson* would seem to confirm that observation; the Due Process Clause does not constitute a statement or prioritization of general values such as autonomy or beneficence but a utilitarian calculus for weighing them. If, as Ely postulates, the selection of substantive values is to be left to institutional processes established by the Constitution, then we must look to those constitutional processes to find principles that legitimate SSA procedures for representative payment.

In this article, our project has been to search for the legitimacy of the procedures writ small, the adjudicatory procedures governing representative payment, that have been adopted through the procedures writ large, the political process by which SSA was, and continues to be, empowered to make law.[230] And we have found it lacking. That is, the political process that empowers SSA to declare what is in the interest of beneficiaries and impose or withhold assistance accordingly, is one that meets the formal constitutional, statutory and administrative criteria for positive validity as law. However, it is not a process that conforms to the transcendent values of participation, representation, accountability and democratic rule that underlie the process writ large expressly provided in the Constitution.[231] In the case of representative payment, the political institutions authorized by the Constitution to select the substantive values to be embodied in law—the Congress and the President—have simply abdicated that responsibility to SSA.[232]

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229. Thus Professor Ely has written:

> [A tour of the Constitution will reveal], contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values" . . . that in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.

Ely, *supra* note 68, at 87 (quoting from Donald R. Wright, *The Role of the Judiciary: From* Marburg *to* Anderson, 60 CAL. L. REV. 1262, 1268 (1972)). In light of this conclusion, Ely argues for "a participation-oriented, representation-reinforcing approach to judicial review." *Id.* Ely's process writ small might be characterized as procedures by which law is applied, and process writ large as procedures by which law is made. This distinction blurs, however, to the extent that adjudication also results in policy formation and lawmaking through stare decisis. *See Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991), for critiques and defenses of Professor Ely's process theory.

230. See *supra* note 229.

231. Ely, *supra* note 68, at 73-88.

232. For a discussion of the demise and ineffectiveness of the non-delegation and vagueness doctrines to preclude such abdication, see the text at *supra* notes 73-95.

My contention is that "broad participation in the process," upon which Ely argues the Constitution legitimatizes value selections, can be provided on a micro, administrative level, by participatory rulemaking, if it is lacking, as it is in the case of representative payment, on the macro, legislative and executive levels. The participation of which Ely writes is participation by the citizenry in the selection of substantive values and policy formation through a representative, democratically elected legislature.[233] When such broad participation is precluded by legislative delegations of unguided discretionary authority to an administrative agency, I submit legitimating participatory values may be supplied by agency rulemaking processes.[234] This is not to suggest that the Constitution requires such a participatory rulemaking process whenever Congress has made a broad delegation to an administrative agency without guiding policy directives. It does mean that the legitimacy, which congressional directives and compliance with constitutional requirements might otherwise provide, *may be* based on compliance with constitutionally derived procedural norms. Ely addresses this point obliquely when admitting that one might value certain decisional principles for their own sake. He states that the values the Court should pursue are "participational" values since they are ones that the Constitution largely concerns itself with; they are consistent with and supportive of democratic government and ones which courts are institutionally well suited to impose.[235] I maintain that such participational values would legitimate not only process writ large but to process writ small, to standards and procedures for the imposition of paternalistic policies by an unguided federal administrative agency, like SSA.[236]

Such a contention is consistent with modern liberal process theory as developed by theorists such as John Rawls and Ronald Dworkin. These theorists have sought to construct new theories of rights and justice by discovering a "neutral medium" or interpretative mechanism for discovering community norms and shared values.[237] The concept of negotiated rulemaking is very much in keeping with Rawl's hypothetical exercise in which abstracted individuals in the original posi-

233. Ely, *supra* note 68, at 73-75.

234. *Cf.* Harter, *supra* note 195.

235. Ely, *supra* note 68, at 75.

236. To the extent that the agency is making law when it adjudicates representative payee issues, process writ large is at issue as well as process writ small.

237. Gary Minda, *Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 644-45 (1989); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 508-10 (1988) (book review).

tion—behind a veil of ignorance about their social and physical attributes and talents—rationally decide what rules should bind them.[238] In negotiated rulemaking for representative payment, persons who will be bound by agency rules, or their representatives, help to shape those rules in ignorance of whether or not in the future they will have the social and personal attributes that result in the application of the rules to their lives. Such an exercise in participatory rulemaking approximates Rawls' thought experiment and creates a mechanism for discovering and acting upon shared values. Just as Rawls' principles of justice have been characterized as *ex ante* justifications for traditional liberal political and economic theory, negotiated rulemaking derives its legitimating power from that same mainstream liberal tradition out of which it grows.[239] This legitimating quality of interest participation has been recognized in other administrative contexts. Vexed by the problem of uncontrolled administrative discretion, in 1975 Professor Richard Stewart explored the extent to which expanded notions of standing have developed in administrative adjudication to permit broad participation in agency policymaking.[240] Recognizing that the simple paradigm of agency adjudication as the application of law to individual factual disputes has given way in the modern administrative state to a paradigm of agency adjudication as a vehicle for quasi-legislative policy formation, expanded participation can be explained as an effort to legitimate the policy formation that occurs in adjudication.[241] These justifications

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238. JOHN RAWLS, A THEORY OF JUSTICE 248 (1971).

239. ROBERT P. WOLFF, UNDERSTANDING RAWLS 195 (1977). *Cf.* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 59 (1983).

240. Stewart, *supra* note 73, at 1748-56, 1762-70. Stewart notes:

> So long as controversies remained bipolar in form and character—citizen versus the government—it remained possible to conceive of administrative law as a means of resolving the conflicting claims of governmental power and private autonomy. However, the expansion of the traditional model to include a broader universe of relevant affected interests has transformed the structure of administrative litigation and deprived the simple notion of restraining government power of much of its utility. In multipolar controversies, demarcation of distinct spheres of governmental and private competency may no longer be feasible, and the non-assertion of governmental authority may be itself a decision among competing interests.

Id. at 1756. *See also* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

241. Stewart & Sunstein, *supra* note 240, at 1278-81. *E.g.*, Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979); Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970). *See generally* Hanes, *supra* note 194, at 731 (recognizing the tension between enhancement of the public interest through citizen participation and the need for prompt and responsible public action).

should apply to policy formation through rulemaking as well,[242] indeed, the opportunities for effective participation by affected interests are greater in rulemaking than in adjudication. This would be true because in adjudication, the agency passively responds to the requests of interested groups to participate while in negotiated rulemaking representatives of persons with affected interests are identified by a convenor and their participation is affirmatively sought out by an agency. Furthermore, unlike litigation expenses, the costs of interested parties incurred in negotiated rulemaking can be paid, at least in part, by the agency under the provisions of the Negotiated Rulemaking Act of 1990 when such funding is necessary to their participation.[243] Thus, often unorganized and indigent individuals, such as poor social security beneficiaries, would be better able to participate in rulemaking than in the adjudication process. Some opportunity for public participation is already called for by the APA's informal rulemaking requirements for public notice and comment.[244] However, as discussed above, these mechanisms have proved ineffective in securing the meaningful exchange of information and adjustment of positions necessary to hammer out policy positions acceptable to parties with different interests in rulemaking.[245]

The objection most often made to negotiated rulemaking is not that it would not provide legitimacy through participation, but that it is practically too difficult and expensive to implement.[246] It is true that difficult questions about representation will arise, such as whether an organization, such as AARP or a welfare rights organization, can actually represent the interests of the aged and the poor well enough to further their welfare in negotiated rulemaking. To the extent that such organizations develop their own separate bureaucratic goals separate

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242. For a discussion of the expansion of interest participation in administrative hearings, see Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972). Professor Gellhorn notes that few controls over interest participation in agency rulemaking are needed because informal rulemaking is designed to incorporate diverse interest groups and to serve as an outlet for community expression. *Id.* at 362.

243. *See* 5 U.S.C.A. §§ 588, 589(f) (West Supp. 1992). *See also* H.R. REP. No. 461, 101st Cong., 2nd Sess. 10 (1990) (regulations affecting largely indigent beneficiaries may present financial and education resource problems in ensuring adequate participation.).

244. *See* 5 U.S.C. § 553 (1988).

245. *See supra* note 208 for a discussion of the ACUS recommendations for the adoption of negotiated rulemaking proceedings.

246. *See* Roger C. Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L. REV. 525 (1972). Other objections might be that participatory rulemaking is simply institutionalized special interest control of agency discretion. Other objections might be that participatory rulemaking is simply institutionalized special interest control of agency discretion.

from the goals of their constituents, and spokespersons pursue their personal interests, they cannot. Yet, courts are experienced in assessing the representational nature of participation in class action litigation and are institutionally better suited to play such a policing role, rather than a policymaking role. Furthermore, if negotiated rulemaking produces participatory procedures, such as face-to-face interviews for beneficiaries, they indirectly provide for representation through individual participation in administrative determinations. Finally, the limited experience with negotiated rulemaking is that rather than imposing additional expenses on agencies, its short term costs avoid the greater long term costs of litigation.[247]

The claim of legitimacy that can be made on behalf of negotiated rulemaking, at least in the context of the representative payee program, may be strong enough to be constitutionally cognizable.[248] We have noted that the Supreme Court has established a due process standard in *Mathews v. Eldridge* that is difficult, if not impossible, to apply.[249] It requires judges to evaluate and weigh public and private interests without a standard, and to determine the costs and benefits of hypothetical alternative procedures with no mechanisms for doing so. The institutional capability of courts to devise a standard, other than judicial intuition, and to obtain relevant information about the cost and effect of procedures through party briefs, amicus curiae submissions and trial testimony has been discussed by other commentators and found wanting.[250] While courts may be institutionally incapable of identifying and assessing the importance of individual interests at stake in governmental actions, such as one's interest in controlling social security benefits, beneficiaries are not. Who would know better than beneficiaries themselves whether their interest in controlling benefits is more or less important than the interest in receiving needed assistance? Who would know better than payees whether their interest in accurate misuse determinations are more or less important than their interest in efficient

247. *See supra* note 207.

248. Participational orientation, writes Ely, "denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made." Ely, *supra* note 68, at 75.

249. *See supra* notes 150-67.

250. Mashaw, *supra* note 143, at 28. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472-74 (1986).

management of entrusted funds?[251] In a negotiated rulemaking, the relative weights of competing interests such as these are determined by the parties affected through their exchanges at the bargaining table.[252]

Furthermore, objectives other than accuracy can count in negotiated rulemaking. For instance, pre-determination opportunities for face-to-face interviews may enhance self-esteem and respect for government and thus have dignitary value to be weighed as a private interest in the cost benefit analysis of *Mathews*, apart from the likelihood that interviews will produce more accurate "findings" of incapability.[253] Yet, beneficiaries might decide in negotiations that they value their interests in effective monitoring programs more highly than they value dignitary interests protected by pre-determination interviews. Where administrative resources are limited, they might trade some effectuation of their dignitary interest for more effective monitoring. The resulting negotiated consensus rule with regard to interviews would then have a validity dependent on the institutional capability of the mechanism that produced it, as well as its participatory process. Recognizing that, there is no reason why courts should not give deference to negotiated rules when applying the *Mathews* calculus.[254] That is, constitutional challenges to rules devised through negotiated rulemaking should

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251. The need for a participatory process to provide factual information relevant to rulemaking was illustrated in the recent discussions of a committee of the Administrative Conference of the United States about how notice should be given to beneficiaries that they are being considered for representative payment. Committee members asked questions such as, do they have mailboxes? Could they sign for a registered letter? Maybe there is never anyone home where they live. Beneficiary representatives might be able to respond to such questions and to weigh the importance of various forms of notice against their costs in terms of alternative procedures. The "we-they" nature of the discussions was also evident despite the fact that almost every worker becomes a recipient of social security benefits regardless of other income. Thus, representatives of beneficiaries with certain characteristics—age, income, and disability may help both to inform rulemaking discourse and ground it in a discussion of "our" interests, rather than "theirs."

252. Professor Lon Fuller has argued that where the dispute for resolution is not bipolar but "polycentric," in that there are several decisions to be made and each decision influences other decisions, it is not suited to judicial resolution but may be settled by some alternative dispute resolution mechanism. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Devising procedures for administration of the representative payee program would seem to be such a task.

253. For a discussion of efforts to evaluate the administrative process in terms of its ability to meet dignitary interests of participants as well as traditional goals of fairness, efficiency and accuracy, see MASHAW, *supra* note 41, at 158-238; TRIBE, *supra* note 91, at 744; Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS 126 (J. Roland Pennock & John W. Chapman eds., 1977).

254. In the Negotiated Rulemaking Act, Congress provided that negotiated rules should not receive any greater deference upon judicial review than a rule which is the result of other rulemaking procedures. *See* 5 U.S.C.A. § 590 (West Supp. 1992).

be more difficult than challenges to rules promulgated by the agency alone.

If negotiated rules were recognized as constitutionally significant, the court's function would shift from weighing the costs and benefits of SSA's rules to assuring the integrity of the negotiated rulemaking process that produces the rules; a function for which courts may well be better suited.[255] Thus, SSA's procedural rules would not be entitled to constitutional deference unless the participants were representative of interests affected and the rule promulgated were one to which the participating parties had agreed. While difficult issues about the extent to which participants represent affected interests, the inclusion of all important interests affected, and the nature of consensus would arise, as noted, courts are accustomed to deciding such issues in class actions and in approving settlement agreements and remedial decrees in multiparty litigation.[256] The courts would seem far better able to police the process by which rules are devised than they are able to evaluate the rules themselves in accordance with *Mathews v. Eldridge* interest balancing.

However, judicially determined due process limits would still have to mark the outer boundaries for negotiated rulemaking on procedural issues. Without the leverage of constitutional requirements, parties such as social security beneficiaries would have little to trade at the bargaining table in negotiated rulemaking on representative payee issues. Parties who will be subject to the procedural rules they negotiate have as their negotiating capital only the realistic threat that if certain fundamental interests are not respected in the negotiations, the parties

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255. Harter, *supra* note 195, at 103. Judge Wald of the District of Columbia Circuit Court of Appeals has discussed the role of a reviewing court that gives deference to negotiated rules. Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 21 (1985). She worries about the importation of an "interest" test into appellate standing that deference negotiated rules might entail, the difficulty in separating interest representation from representation on the substance of the issues to be negotiated, and the replacement of the arbitrary and capricious standard of review with interest representation. *Id.* at 21-22. This author would agree with Judge Wald that consensus cannot replace arbitrary and capricious review. Judge Wald recognizes that limited judicial review or deference to negotiated rules "grounds the legitimacy of agency action, indeed of all government action, on the ability of the government to reconcile conflicting political and practical interests as expressed by interest group representatives." *Id.* at 23 (footnote omitted).

256. FED. R. CIV. P. 23(b); Cotton v. Hinton, 559 F.2d 1326, 1329-30 (5th Cir. 1977). For an excellent discussion of the difficulties involved in representing classes in public interest litigation, see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982). *See also* Maimon Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887.

will withdraw and litigate the issue after the promulgation of a final rule. Thus, while a court might give greater weight to negotiated procedural rules than others, ultimately due process limitations on agency powers established through judicial review would continue to circumscribe the rulemaking.

The participatory justice model is responsive to the insights of several current jurisprudential movements. In keeping with libertarian principles, negotiated rulemaking is a process that embodies some of the major justifications for the rule of law put forward by law and economics theorists. Whether of the traditional Chicago school or the more recent liberal reformist school, law and economics scholars point out that to a large extent human behavior can be understood and predicted in accordance with principles of rationality and self-interest.[257] Not only do people generally act rationally in their own self-interest, they maximize their preferences and thus increase aggregate "wealth" when they engage in exchanges in which parties trade lesser preferences for ones they value more highly.[258] Thus, some law and economics scholars ascribe not only to the descriptive value of microeconomic analysis but to its normative value as well.[259] That is, laws which allocate resources to their most highly valued use are not only those that generally do pertain, but such laws ought to pertain because they result in the maximization of "wealth."[260] Described in this way, basic concepts developed through law and economics analysis underlie negotiated rulemaking. Fundamental to the negotiated rulemaking process is the belief that affected parties bring to the bargaining table a number of positions on the several issues to be resolved. In the process of negotiating a consensus position, the parties trade off their lesser valued positions in order to gain ones they value more highly. In accordance with wealth maximization theory, if the parties are permitted through

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257. *See* Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341 (1988) (discussion of reformist law and economics approach to administrative law analysis). The author argues that public choice theory which attempts to provide realistic methods of making collective choices is based on the assumption that political actors are self-interest maximizers. *Id.* at 344-45. The author also laments the fact that law and economics theorists have not focused on agency behavior but on judicial review, too often assuming that bureaucracies should act like courts. *Id.* at 347-48.

258. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3-15 (3d ed. 1986).

259. Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 353-57 (1984).

260. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119-36 (1979). Wealth in this broad kind of analysis stands for things of value including, but not limited to, money. *See, e.g.*, POSNER, *supra* note 258, at 15; POSNER, *supra* note 239, at 60-61.

negotiated rulemaking to exchange their preferences, they will accomplish an allocation of agency resources that is optimally efficient[261] to create the "better rule." Thus, negotiated rulemaking as a method of legislative policy formation by administrative agencies depends heavily on the validity of law and economics analysis and seeks to harness its normative value as a basis for legitimacy.

Paradoxically, negotiated rulemaking may also draw on the validity of the jurisprudential positions of other scholars who criticize the mainstream libertarian and microeconomic premises upon which negotiated rulemaking depends. Critical legal studies (CLS) theorists provide at least three insights relevant to an evaluation of negotiated rulemaking as a legitimating process for establishing rules to regulate governmental paternalism. First, CLS scholars recognize the indeterminacy of law, that is, its uncertainty, and amenability to different constructions and meanings.[262] No term could be more indeterminate in its legal context than "interest" as it is used in sections 205(j) and 1631 of the Act, without even congressional policy statements or legislative history to narrow its potential meanings. Second, some critical legal scholars find within the indeterminacy of law fundamental contradictions or polarities upon which contradictory legal interpretations and doctrines turn.[263] Again, the interests in autonomy and beneficence which a philosophical analysis of paternalism finds in tension provide the polarities to be reconciled in the exercise of paternalistic discretion. As demonstrated above, the legal and therapeutic justice models represent antagonistic legal doctrines that result from the values put in tension by the concept of paternalism itself. Professor Gerald Frug has concluded that once liberated from the bipolar false consciousness through which people have understood the world and bureaucratic domination, we should strive to form organizations based on an ideal of participatory democ-

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261. JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 202-15 (1988). Coleman argues that it may not always be desirable to permit parties to trade off justice (as it would have been adjudicated) for efficiency in private settlements, in part because settlements affect unrepresented third parties and fail to produce legal precedents.

262. Minow, *supra* note 59, at 84.

263. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984). Professor Gerald Frug argues that efforts to legitimate bureaucratic behavior fail because they rely on a dichotomy between personal subjective values of self expression and shared objective values of society. Both must be effectuated in bureaucratic organizations, yet no line can be drawn between them because the personal can only be defined in terms of the world in which we live and the world is composed of the aggregation of personal selves. Frug, *supra*, at 1286-92.

racy in which people create for themselves the form of organized existence within which they live and thus confront the intersubjective nature of social life.[264] Although Professor Frug discusses larger social organizations, negotiated rulemaking concerning the bureaucratic organization controlling social security benefits would seem to be in keeping with his prescription. Third, as an outgrowth of legal realism, critical legal studies emphasizes the non-rational, contextual nature of the legal enterprize. CLS scholars maintain that law is not a reflection of objective rationality, but rationalizes a given political culture.[265] They emphasize the difference that the race, sex, age, time, place and life experience make in the perspective from which the law is created through interpretation. Most commonly it is the judge's life experience through which issues to be resolved are perceived and which mediates an understanding of its consequences. If that critique is applied to agency decisionmaking, the law created through either rulemaking or adjudication must reflect the life experience of agency bureaucrats. In addition, some CLS scholars maintain that such context includes a society which prizes autonomy, self-interest and rationality above other values such as human connectedness, community and emotion.[266] If the law is indeterminate and gains its content through the interpretations of those with the power to make their interpretations authoritative, then the law is "power speech" and legitimate only if the basis of power is legitimate.[267] In response to this critique, participatory rulemaking can at least claim to empower interpreters who do not necessarily reflect the characteristics of traditional lawgivers. Representatives of organizations of low income, mentally retarded, mentally ill, elderly, physically disabled and frail social security beneficiaries, as well as representatives of those who deal with them, such as payee organizations, families and health care providers necessarily empower people of difference[268] and enrich the context in which the law will be created. The values, criteria and standards they select to allocate the sometimes coercive assistance provided by representative payment may well not be based on abstract, "either-or" notions of capability and in-

264. Frug, *supra* note 263, at 1295-96.

265. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114 (1987). *See also* ROBERT M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1-14 (1986).

266. Minda, *supra* note 237, at 619.

267. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1517 (1991); Minda, *supra* note 237, at 656.

268. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

capability, but on a more complex understanding of the need for and right to managerial assistance as they experience it. Rather than positioning individuals affected by rulemaking as objects of the law, to be categorized in accordance with simplistic, abstract dichotomies, negotiated rulemaking endows them or their representatives with lawgiving power, at least within the outer limits of agency concurrence (essentially assured by the agency at the initiation of negotiated rulemaking) and judicial, due process review.

Negotiated rulemaking, then, particularly around the issues presented by representative payment, provides a response to the critics of a legitimacy premised on autonomy and rationality. To the extent that it provides a mechanism through which other values can be selected in a context which reflects more of the variation and feeling of the social environment in which the rules will operate, and to the extent that it empowers not those who administer the rules but those whose lives will be experienced differently because of them, participatory rulemaking provides validity and legitimacy to the rules based on that participation and the possibility of non-rationality and alternative value selection. Thus, negotiated rulemaking does not polarize the issues for decision as does SSA's capability-incapability regulations and the *Mathews* due process test which weighs individual interests against government interests. Instead, it permits consideration of a variety of perspectives on problems posed by beneficiaries with various functional characteristics, put forward by representatives of persons in different relationships that will be affected by the rulemaking. While some abstraction of these complex relational interests is necessary to their representation in negotiated rulemaking, they are not bifurcated by the rulemaking process as they are by the litigation process. Negotiated rulemaking process does not declare winners and losers but strives to produce a consensus rule to which all can agree based on their acceptance of common values.[269]

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269. This problem solving approach has much in common with the feminine perspective described by Carol Gilligan and others and permits the expression of a feminine ethic of care and responsibility as well as a male ethic of rights. According to Professor Carol Gilligan and some feminist legal theorists, women tend to perceive the moral issues differently than men and speak about the legal dilemmas in a "different voice." CAROL GILLIGAN, IN A DIFFERENT VOICE 16-23 (1982); Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice In the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 247 (1988). Empirical studies seem to indicate that women conceive of the problems posed by certain moral choices as ones involving networks of relationship rather than polarized and prioritized rights and duties; as susceptible to a variety of approaches and solutions rather than right and

VI. CONCLUSION

In this article, we have found that the standards and procedures adopted by SSA's representative payee program do not effectuate the interests in either autonomy or beneficence which are put in conflict by the paternalistic task Congress has given to SSA. The payee program straddles the models of legal and therapeutic justice, failing to embrace either. However, the question is not which of those models should be preferred: whether to reform representative payment, like civil commitment and guardianship, in accordance with a legal justice model to safeguard liberty interests, or to model SSA's program after VA's fiduciary program to better assure the provision of needed assistance. Rather, the proper question is by what process should the models and the values upon which they are dependent be selected? Is there a legitimate way in which these values can be chosen and embodied in procedures which shape the substance of the representative payee program? I conclude that in the absence of congressional direction and executive accountability, a source of legitimacy lies in the process for administrative policy formation presented by negotiated rulemaking, which reflects a participatory justice model, based in the process values underlying our representative democratic government. While its legitimacy rests heavily upon the concepts of autonomy, consent and social compact which support the traditional libertarian concept of law that gives rise to the problem of paternalism, it is also responsive to the insights and concerns expressed by current critics of that conception. The present agency rulemaking process has produced ineffective and ambiguous procedures that compound, rather than resolve, the problem of ad-

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wrong answers; and as having emotional as well as rational implications that deserve consideration. GILLIGAN, *supra*, 24-63. To the extent that the traditional libertarian approach conceives the moral dilemma posed by paternalism as a choice between individual rights to autonomy and social rights to affect remediation, it is a male perception of the problem and its possible solutions resulting in the fair result. A particular feminine approach might see the problem as one requiring the adjustment of a variety of relationships to bring about the realization of shared values and responsibilities resulting in the good result as might be possible through negotiated rulemaking. Other feminist legal scholars would fear male dominance in participatory rulemaking as in other areas of public and private life. CATHERINE A. MCKINNON, FEMINISM UNMODIFIED (1989). McKinnon and feminists more radical in their perception of gender differences and power relationships might find participatory rulemaking just another forum in which male dominance would skew the ability of organizational representatives to reflect the views of mixed gender membership and prevent the formation of a consensus. These and other feminists argue that women fair badly in alternative dispute resolution because, unprotected by concepts of right and formal procedures, they are subordinated to men (much as they are in other male-female relationships such as marriage, parenthood and employment) because men have physical, economic, educational and life experience advantages over women.

ministrative paternalism. The proposed process could hardly do worse. Moreover, Congress has endorsed the process, has provided a structure for its implementation, and has addressed some of the important issues it presents. Even if participatory rulemaking is not to be wholly grounded in a single concept of justice and jurisprudence, perhaps it should be initiated by SSA for pragmatic reasons. It might just work.[270]

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270. *See Symposium on The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1991) (discussion of the tenets of pragmatism).