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The Judicial Transformation of Social Security Disability: The Case of Mental Disorders and Childhood Disability

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THE JUDICIAL TRANSFORMATION OF
SOCIAL SECURITY DISABILITY:
THE CASE OF MENTAL DISORDERS
AND CHILDHOOD DISABILITY

Jennifer L. Erkulwater

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INTRODUCTION
An acute observer of American political culture, Alexis de Tocqueville once stated, "[t]here is hardly a political question in the United States
which does not sooner or later turn into a judicial one.\textsuperscript{1} Though he made this statement in 1840, Tocqueville might as well have been speaking of America today. Indeed, legal scholar Robert Kagan calls this American penchant for settling disputes through the legal process "adversarial legalism."\textsuperscript{2} While legalistic forms of conflict resolution are, as de Tocqueville notes, an integral part of American democracy, Kagan asserts that adversarial legalism has become an increasingly prominent part of political and policy conflict in the United States over the course of the last thirty years.\textsuperscript{3}

Nowhere has the growth of this peculiar culture of legalism been more evident than in the transformation of Social Security disability policy in the past two decades. During the 1980s and 1990s, the federal courts were frequent and aggressive participants in Social Security disability policy making, and they were instrumental in driving the growth of disability benefit programs at a time when there was not a consensus in favor of Social Security expansion in either Congress or the White House. More importantly, however, not only did the courts expand the disability programs; they also changed the composition of the Social Security rolls and opened the door to a quandary of political and administrative troubles in an effort to make the disability certification process more "accurate." In the past, the strict administrative regulations governing the certification of disability excluded the vast majority of adults with mental disorders and disabled children. Throughout the mid-1980s and early 1990s, advocates for the mentally disabled and disabled children contested those regulations in court. They succeeded in convincing federal judges to strike down a host of these regulations and force the Social Security Administration (SSA) to revise its standards for childhood and mental disability.

Most studies of growth in disability programs tend to focus on economic factors. Nevertheless, while the ups and downs of the business cycle undoubtedly influence expenditures for disability programs, they

\textsuperscript{1} ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (George Lawrence trans., Harper Perennial 1969) (1835-40).
\textsuperscript{3} Kagan, Adversarial Legalism, 1995, supra note 2, at 92-93.
leave a significant portion of the growth unexplained.\textsuperscript{4} In order to understand that which economics cannot explain, we must turn to politics, the political struggle over the proper legal and administrative definition of disability. Legalism, therefore, provides a useful framework for an analysis of both the transformation of disability programs and the corresponding challenges that have arisen in Social Security disability policy in recent years because of those changes.

A full account of the judicial influence on Social Security disability programs would require a book-length, perhaps even encyclopedia-length, treatise and would take us far afield from our present concern. This article focuses narrowly on the activities of Legal Services attorneys, mental health reformers, and children's advocates. Although mental health reformer groups are only one of many antipoverty organizations involved in advocacy efforts on behalf of the disabled poor, they have been among the most persistent, the most active, and the most successful in using a litigation strategy to achieve their larger policy goals. According to one Social Security official, though there were "pockets of spokespersons for other disabilities," no other disability group presented, as concerted an effort as did mental health reformers.\textsuperscript{5} As this article argues, their success and the corresponding transformation in Social Security disability raises a number of policy and administrative challenges that Congress has yet to address.

\textbf{I. THE GROWTH AND TRANSFORMATION OF SOCIAL SECURITY DISABILITY}

The two disability programs of Social Security, Disability Insurance (DI) and Supplemental Security Income (SSI), have changed dramatically in the past two decades. Together the two programs function as an income floor for the disabled.\textsuperscript{6} DI provides cash payments to disabled workers who have paid into the disability trust fund through the payroll tax. The amount of the benefit depends on the amount of the past wage contribution. SSI supplements the income of disabled workers whose contributions are

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\textsuperscript{5} Telephone Interview with Patricia Owens, Associate Commissioner, Office of Disability, Social Security Administration (Apr. 25, 2000).

\textsuperscript{6} SSI also aids the aged, but expansion in that portion of the program has been negligible.
so minimal that their incomes fall below the poverty line. The SSI program also provides up to $500 per month in income support to poor disabled individuals who fail to qualify for DI because they have no history of workforce attachment.

Both DI and SSI have experienced rapid expansion since the mid-1980s. At its peak in 1994, the number of disabled persons receiving DI, SSI, or both, reached 7.2 million, an increase of 70% since 1985. In 1985, approximately 92,000 workers received disability payments; by 1998, that number had more than quadrupled to almost 450,000. Though a smaller program than DI, SSI presented an even more pronounced pattern of growth. Between 1985 and 1998, the number of disabled adults receiving SSI payments nearly doubled from 1.9 million to 3.6 million, while similarly, the number of disabled children rose fourfold from a mere 227,000 in 1985 to a high of 1 million recipients by 1996. Throughout the 1990s, DI experienced an average growth of seven percentage points each year. Meanwhile, between 1990 and 1996 SSI’s disability rates averaged 6.5% annually for adults and 20.7% annually for children between 1990 and 1996. Enrollment and application for SSI has dropped off sharply since 1996. This is no doubt a result of the changes Congress made to the program as part of its welfare reform initiative.

Even more significant than the number of disabled persons enrolled in SSI and DI is the type of disabilities that beneficiaries present. Since the 1980s, the proportion of Social Security beneficiaries drawing payments because of a mental disorder as opposed to a physical impairment, has more than doubled. This transformation is especially stark in SSI beneficiaries. In 1981, allowances based on a mental disorder comprised 10% of all DI awards; after 1986, between 20% and 25% of all allowances were made because of a mental disorder. In 1981, only one out of every

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10. Author’s calculations based on data in 2001 SSA, Disabled, supra note 8 and SSA, Recipients, supra note 9.
ten persons receiving DI payments was mentally disabled;11 in the 1990s, that figure hovered between one in four and one in five.12

Because SSI does not require applicants to demonstrate a history of paid employment in order to qualify for benefits (thus allowing more individuals with congenital or early-onset disabilities on the rolls), the number of individuals with mental disorders has been more pronounced in SSI than in DI. The SSA estimated that in 1977, roughly 18% of SSI applicants who were awarded benefits suffered from a psychiatric disorder, while another 13% were mentally retarded.13 By 1986, the mentally ill comprised almost one quarter of those on the SSI disability rolls, and within ten years that proportion grew to one in three.14 Today, mental retardation and psychiatric disorders together constitute well over half the awards made in SSI, but that figure is even higher in the case of children. Almost two-thirds of children receiving SSI are disabled due to either mental illness or mental retardation.15

The prevalence of the mentally disabled individuals among Social Security recipients has had profound political implications. Mental disorders are not only difficult to diagnose; in addition, measuring and predicting their effect on the functional capacity of an individual is fraught with uncertainty. This uncertainty can open the door to public perceptions that the disability programs are filled with malingerers, frauds, and welfare cheats. Moreover, because beneficiaries with mental disorders tend to be younger than their physically disabled counterparts, their presence on the rolls drives up program expenditures, now and in the foreseeable future. Many policy makers also worry that giving a younger individual cash benefits for life will encourage dependency and ruin that individual’s

11. Mental disability refers to a disability resulting from any form of a mental disorder: mental retardation, learning disabilities, psychiatric illnesses, addiction, and so forth. Mental retardation refers strictly to clinically diagnosed retardation (in SSI and DI, I.Q. below seventy).
chances for rehabilitation. Cash disability benefits for disabled children raise especially thorny issues since the money is spent, not by the child, but by the parent, thus creating a situation in which parents might have an incentive to keep their children functionally incapacitated and helpless. As long as the number of mentally disabled persons and disabled children on the Social Security disability rolls remained relatively small, the SSA largely swept these politically contentious questions under the proverbial rug. By the early 1990s, however, the agency and the programs it administered were beset by a host of administrative problems that, when coupled with rapid program growth, created a firestorm of political controversy. The court-driven expansion of Social Security disability made these issues all but impossible for legislators and policy makers to ignore.

II. LITIGATION AND POLICY CHANGE

Many scholars have examined the role of litigation in stimulating policy change. Some, looking back at the Warren Court’s crusading liberalism, contend that the courts are only one of the many players in political drama—and frequently, a constrained one at that. For instance, using civil rights and abortion cases to illustrate his point, Gerald Rosenberg argues that the federal courts are limited in their ability to induce progressive policy change. Not only must judges base their decisions on constitutional rights and court precedent that tend to constrain governmental activism, but even if they are sympathetic to the objectives of liberal reformers, judges must avoid drawing the ire of elected lawmakers and the pubic. Indeed, in the face of intractable opposition, judges can do little to implement and enforce their own decisions without the cooperation of other political officials. ¹⁶ A number of scholars, on the other hand, argue that because of their insulation from popular pressures, courts can and do generate policy change when other branches of government are gridlocked. Through their rulings, judges can take bold, often unpopular stands that educate the public and policy makers about the justness of a litigant’s claims, compel political debate on a topic that elected officials would rather dodge, and set the wheels in motion for further policy

innovation. Even if courts cannot directly make policy, they can at least serve as a catalyst for larger progressive policy transforms down the road.

Of course, a number of scholars who acknowledge the judiciary’s influence on policy, nevertheless remain skeptical about whether the judicial forum is necessarily a desirable place for policy making. According to Robert Kagan and his colleagues, resolving policy conflicts through litigation is expensive, time-consuming, and wasteful. Using the dredging of Oakland Harbor as one example, Kagan contends the litigants were caught in a war of attrition for many years as each side (the city of Oakland, the Environmental Protection Agency, the Army Corps of Engineers, fishermen, and environmentalists) tried to exhaust the others through endless rounds of environmental impact statements, legal motions, and courtroom maneuvers. While attorneys grew wealthy, pressing public needs remained unmet. The harbor remained undredged; jobs were lost; and cargo ships went elsewhere. Similarly, both Donald Horowitz and R. Shep Melnick argue that because judges base their rulings on only the cases that come before them—cases that may or may not be representative of a wider policy problem—and because they issue their rulings on a case-by-case basis, courts are not necessarily the best place to weigh the costs and benefits of various policy alternatives. Indeed, insofar as courts exist to enforce rights, the issue of costs—social or economic—is often obscured. Moreover, because judges are unable to follow through on their original decisions—monitoring their implementation and modifying the remedy in light of changing circumstances or unforeseen snafus—court intervention can lead to unanticipated headaches for lawmakers and program administrators.

Whether the courts had a significant effect on policy change is a question of whether we see the glass as half full or half empty. Rosenberg can hardly argue that Brown v. Board of Education and Roe v. Wade did

17. Id. at 21-26.
not matter, but proponents of litigation can not assert that these cases were all that mattered. When political and social forces are moving in the same direction as the courts, the courts are obviously, in turn, more effective as purveyors of policy change. Nevertheless, as in the example of Social Security disability, the courts can have an enormous impact on programs even if the White House opposes such change and Congress is mired in disagreement. Indeed, one seemingly small court decision can have ramifications throughout the policy process, making certain outcomes more likely than others. Cumulatively, these court decisions can push policy in directions that would seem unthinkable in the absence of judicial intervention. *Sullivan v. Zebley*, for example, single-handedly transformed the SSI children’s program. In the case of mental disability, mental health reformers note that two court cases, *Mental Health Ass’n of Minnesota v. Schweiker* and *City of New York v. Heckler*, while not necessarily changing the disability programs overnight, certainly contributed to their success in convincing members of Congress and the SSA to change the medical standards for evaluating mental disorders.

To be sure, the influence that the federal courts would come to have on Social Security disability policy was not unforeseen. During the 1980s and early 1990s, however, the relationship between the courts and the SSA took a new and fateful turn, as the courts became a catalyst for forcing policy change in the disability programs. Liberal advocates for the poor turned to the court to block policy changes with which they disagreed and, in turn, to induce expansive policy changes that they preferred. In the hands of these advocates, courts were not just there to right individual wrongs, but also to produce policies that they believed adhered more closely to the spirit of the Social Security Act.

The court cases brought by advocates on behalf of disabled claimants were a new force in Social Security policymaking. Previously, liberal advocates had pushed expansive measures in Congress, working closely with both the lawmakers who sat on the congressional authorizing committees and executives at the SSA. The disability advocates of the 1980s and early 1990s, however, brought lawsuits precisely because they believed that the channels that liberals had traditionally used were no longer available. Because members of Congress and the SSA would not

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listen, advocates advanced their policy arguments in the courts. Victories in the judicial venue provided advocates with the leverage needed to force the SSA to the negotiation table in order to revise its mental and childhood disability standards.

Whether we regard the courts' forays into policymaking as beneficial or detrimental depends, in large part, on whether we like the end result. Liberals, no doubt, heartily cheer the role that the federal courts have played in loosening disability standards, while conservatives would cite this as yet another example of judicial activism run amok. As the following case of Social Security disability illustrates, however, reality is often more complex. Ironically, the policy and administrative changes that resulted from the litigation made the disability process more exacting and thorough. Program administrators now collected more thorough documentation of impairments and paid greater heed to the needs of hard-to-serve populations, such as the mentally ill and children. At the same time, however, judicial intervention contributed to the administrative problems that continue to plague the SSA. Judicial activism furthered the fragmentation of Social Security disability policy and divorced policy change from congressional input. Thus, at the same time that the SSA's workload increased and its tasks grew more complex, congressional budget-cutters were scaling back on the resources available to the agency—the result: long processing times, different standards of eligibility used in different regions and at different levels of administration, and unpredictable trends in enrollment and expenditures. Although Congress enacted a number of reforms in SSI and scaled back the ability of legal services attorneys to bring far-reaching class action litigation of the kind that drove the expansion of SSI and DI in the 1980s and early 1990s, many of these expansions remain intact as do a number of the problems they created. Thus, while litigation brought many improvements to disability benefits policy, not the least of which was the refinement of a disability determination process rife with shortcomings and inaccuracies, at the same time, it also begot a number of unforeseen administrative and policy conundrums that continue to vex policy makers.

III. MENTAL DISABILITY AND CHILDHOOD DISABILITY: POLICYMAKING THROUGH LITIGATION

The judicial transformation of Social Security disability has many roots. According to Kagan, adversarial legalism is endemic to the American political system, evolving out of the nation's fragmented institutional structure and its cultural mistrust of governmental authority. The prevalence of adversarial legalism, however, increased in the 1960s
and 1970s, when demands for increased governmental activism in consumer protection, the environment, and civil rights were channeled through the lawsuit. Rather than establish another bureaucratic agency to enforce new regulatory laws, both liberals and conservatives agreed to allow citizens to enforce those legal requirements independently through court actions.\footnote{Kagan, Adversarial Legalism, 1995, supra note 2, at 104-16. On the “rights revolution,” see R. Shep Melnick, The Courts, Congress, and Programmatic Rights, in REMAKING AMERICAN POLITICS 188, 188-212 (Richard A. Harris & Sidney M. Milkis eds., 1989).}

The “rights revolution” came to Social Security in the 1980s; indeed, it sprang from the collapse of the consensus that had supported system expansion since the 1950s. Even in the absence of the legal advocacy campaign waged by mental health reformers and children’s representatives, the federal courts were heavily involved in Social Security disability programs for two reasons. First, determinations regarding disability are inherently subjective and difficult to make, leaving a great deal of room for disagreement between well-intentioned individuals. Though the statute and regulations provide general guidance on the definition of disability, disputes arise when the general definition is applied to specific cases. Disputes also arise over whether the standards employed by the SSA are correct in the first place; whether, in other words, the regulations that the SSA issues are in accord with the dictates of the Social Security Act. Second, the disability certification process reflects this difficulty by creating a multi-layer process replete with opportunities to second-guess previous determinations throughout the process, up through and including the federal courts.\footnote{Disability claims pass first through the state level where a state disability determination agency makes the initial decision regarding eligibility. If the claimant disagrees with the state agency, she can ask for a reconsideration of her claim. Following reconsideration, the claimant can then appeal the denial through a complex administrative appeals process that proceeds from the state agency to a quasi-independent hearing officer—an administrative law judge—then to the SSA Appeals Council and finally to the federal judiciary starting at the district court level.}

Thus, even before the Reagan administration’s disability reviews mobilized legal advocates, the courts were regularly involved in disability policy because they are part of the appeals process to which claimants were entitled. As the final forum for appeal for disabled Social Security claimants, the federal courts articulate standards of disability and procedural protections that they expect to be binding.
Nevertheless, three developments in the late 1970s and early 1980s brought the "rights revolution" home to Social Security. First, by the mid-1970s, with the maturity of the social insurance programs and dismal economic and demographic forecasts, lawmakers turned from system expansion to concern over issues of cost control. Once the Social Security system entered an age of retrenchment, the judiciary became an attractive forum for progressive policy change. Mental health groups and those representing the poor had never ranked among the powerful in Congress, but the rise in concerns over cost control further narrowed legislative avenues of expansion. The Carter administration had addressed issues of cost control through the 1980 disability amendments, which contained provisions that reduced the size of benefits for younger disabled workers, and mandated a periodic review of the disability rolls to weed out cheaters and malingerers. When Reagan entered office, he stepped up the timetable and scope of these periodic reviews. Throughout the early 1980s, the Reagan administration downplayed the complaints of advocates and was determined to pursue the reviews, while Congress remained paralyzed by disagreement over how to handle the public backlash.

Unlike Congress, the federal judiciary was neither frozen by discord nor constrained by cost considerations. While Congress and the executive branch attempted to balance program spending with revenues, judges were much more amenable to the arguments of advocates, which focused on individual rights and ignored the issue of overall costs. Moreover, since Congress seemed incapable, at least until 1984, of rendering a legislative remedy for the controversy over the periodic reviews, the judiciary's ability to unilaterally grant relief to denied beneficiaries made them an especially attractive forum for advocates representing aggrieved claimants. Of course, as some advocates admitted, a courtroom was not the ideal setting for pressing policy initiatives because judges lack enforcement and implementation powers. But given their inability to access the executive branch and the impasse among lawmakers, advocates had little choice but to turn to the courts.

A second development brought the crusading litigation of the “rights revolution” to the doorstep of the SSA: the backlash among liberal advocacy groups against President Reagan’s attempt to roll back “big government.” Antipoverty advocates’ litigation strategy grew out of the battle over the Reagan administration’s disability reviews from 1981 through 1984. These reviews mobilized advocates, and, once mobilized, those advocates were determined not only to halt the reviews but also to expand the disability programs to previously excluded or underserved groups. Between 1984 and 1992, advocates for the poor used litigation to liberalize the disability criteria for the mentally ill, drug addicts and alcoholics, and disabled children.

Finally, the SSA’s own initial reaction to the first disability lawsuits (which resulted not from the Reagan disability reviews but from an earlier review of SSI), intensified the advocacy crusade in the courts. During the disability reviews, the SSA asserted its long-standing policy of non-acquiescence. This policy infuriated and radicalized the lower federal courts. According to its non-acquiescence policy, the SSA refused to follow court precedent with which it disagreed, even in the circuit that established the precedent, thus violating the accepted legal tradition of stare decisis. While it would apply precedent from the Supreme Court, the SSA ignored decisions handed down by lower courts, except in the case of the specific litigant before the court. The agency argued that following precedent would result in eligibility standards that differed between circuits, thus contradicting Congress’ intention to create nationally uniform disability programs.31

Non-acquiescence was a direct challenge to judicial authority that enraged many judges. While the SSA could pursue this strategy when the number of appealed cases and the attention surrounding them was minimal, the periodic reviews brought thousands of cases before federal judges, making the SSA’s flouting of judicial authority obvious. As the Reagan administration’s reviews wore on and the SSA hardened its non-acquiescence approach, the lower federal courts became increasingly hostile toward the agency. This hostility affected the way the courts treated the SSA as soon as administrators entered the courtroom. According to R. Shep Melnick, “[j]udges’ images of the administrative process are of the

utmost importance because the central issue in administrative law is the extent to which judges should defer to administrative judgment and expertise. Judges are unlikely to defer to administrators they do not trust."\(^{32}\) Surveying the situation, one legal advocate pointed out, "[a]ll of this judicial frustration with the agency inure[s] to the benefit of claimants."\(^{33}\) After the reviews were over, the courts remained antagonistic toward the SSA, much more willing to second-guess administrative actions and suggest legal remedies than they had been previously.

As the reviews proceeded, advocates for the poor became more knowledgeable about the legal arguments to which judges would respond. They also grew more attentive to implementation and more forceful in using the courts to follow through on compliance once they had secured a favorable court decision. For instance, they skillfully used class action suits to circumvent the SSA's policy of non-acquiescence. According to one attorney familiar with disability claims, "the way to ensure agency compliance with the law of the circuit is to make all decisions legally enforceable by all claimants similarly situated"\(^{34}\) through the "vehicle" of the class action lawsuit. If the SSA would abide by an appellate court's ruling only in the case of the specific litigant, then the solution, advocates surmised, was to broaden the number of named litigants.\(^{35}\) Throughout the 1980s, the class action lawsuit became a powerful tool for the liberalization of disability standards. Although the large number of cases brought by individual plaintiffs is not insignificant, this paper will focus primarily on class action suits.

This article discusses the transformation of Social Security disability in the areas of mental disability and childhood disability, but the findings apply to other areas of disability as well. Legalism began in 1981 with the disability reviews, and continued throughout the next fifteen years. By 1990, almost every aspect of disability was under dispute in the nation's federal courts.

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32. [Shep Melnick, Administrative Law and Bureaucratic Reality, 44 ADMIN. L. REV. 245, 246 (1992).]
33. See [Carolyn A. Kubitschek, Social Security Disability: Law and Procedure in Federal Court 9 (1994) (For additional quotations demonstrating the vitriol between the judiciary and the SSA, see id. at n.34)].
34. [Id. at 37.]
35. [Id..]
IV. REMAKING DISABILITY

In order to understand the effect of this litigation advocacy campaign on the disability programs, one must understand how the SSA determines disability. The steps that the SSA uses to determine whether a person is disabled under the Social Security Act are highly technical and very complicated. They also seem bureaucratically mundane. They are, however, of vital importance to the politics of Social Security disability. Subtle shifts in any one of these steps can produce vast aggregate changes in the number and type of claims approved for benefits.

According to the Social Security Act, a person is disabled if she is unable to "engage in substantial gainful activity" because of a "medically demonstrable," long-term "physical or mental impairment." When certifying a claimant, the SSA considers three components of the disability: 1) the medical impairment (the severity of its clinical signs and symptoms); 2) the functional impact (the extent to which the impairment prevents an individual from performing certain activities; and 3) the vocational characteristics of an individual (the extent to which her age, education, and work history will prevent her from finding a job). A person is deemed "disabled" if a medical impairment is so severe that the person, given her functional and vocational profile, is unable to engage in remunerative work.

Generally, the SSA deems the medical manifestations of impairment the most concrete and least subjective of the three factors. Clinical descriptions of medical signs and symptoms are catalogued in the agency's Listings of Medical Impairments. On the other hand, functional capacity and vocational profile are more subjective because they are difficult to measure and because their manifestation and severity can vary widely between individuals who are otherwise similarly situated. Nonetheless,

42. See Carroll M. Brodsky, Factors Influencing Work-Related Disability, in PSYCHIATRIC DISABILITY: CLINICAL, LEGAL, AND ADMINISTRATIVE DIMENSIONS 49-65 (Arthur T. Meyerson & Theodora Fine eds., 1987); Saad Z. Nagi, The Concept and
social functional capacity and work history tend to be the most significant predictors of whether a person will actually work in the future.\textsuperscript{43} The tension between these two goals—the desire to ground disability on something objective (like clinical observations of medical phenomena), on the one hand, and, on the other, the desire to produce an accurate judgment as to whether a particular claimant can work (taking into account functional capacity and vocational characteristics)—has long been a source of consternation within the Social Security Administration. Although policy makers operated on the assumption that Social Security’s definition of disability should weigh the biological, functional, and vocational aspects of disability, the political standing of DI and SSI rests on the understanding that the more objective factors—the clinical criteria for qualification—will dominate the disability certification decision.\textsuperscript{44}

Over time, however, the courts encouraged the SSA to adopt an interpretation of disability that was increasingly individualistic, one that incorporated greater attention to the unique circumstances of the particular claimant with greater weight placed on aspects of disability that the SSA believed to be easier for the claimant to feign or influence. Judges, for instance, required the SSA to place greater weight on functional capacity; the testimony of friends, family, and acquaintances; opinions of the physician treating the claimant (whom the SSA fears will be tempted to side with her patient); and the claimant’s own statements regarding pain and discomfort. Nevertheless, to be fair, many current officials at the SSA argue that as a result the SSA adopted a framework of disability determination that was much more accurate in terms of predicting whether an applicant could actually work.\textsuperscript{45} In a rather ironic twist, the disability determination process had to become more individualistic and subjective in order to achieve greater accuracy because disability itself is an individual and subjective phenomena.


\textsuperscript{44} DEBORAH A. STONE, \textit{The Disabled State} 83-84 (1984).

\textsuperscript{45} Interview with Janet Bendann, Official, Office of Childhood Disability, Social Security Administration, Baltimore, Md. (Mar. 7, 2001).
V. MENTAL DISABILITY

When, in March of 1981, the Reagan administration attempted to purge the disability rolls of beneficiaries the SSA found to be "no longer disabled," mental health reformers believed that the SSA had adopted an unrealistically strict interpretation of disability. They mobilized to enforce what they believed was the proper interpretation of the statutory standard of disability, but they eventually accomplished much more. Ultimately, they convinced the SSA to completely rewrite its mental disability standards and, in the process, succeeded in establishing an entirely new way of classifying mental disorders. The SSA's review of the Social Security disability rolls had a devastating impact on mentally ill beneficiaries. Though they comprised only 11% of DI beneficiaries and 18% of SSI recipients, persons with mental illness constituted 26% of the terminations. Mental Health Association of Minnesota v. Schweiker\textsuperscript{47} was the first of the lawsuits brought by mental health reformers, followed shortly by another class action lawsuit, City of New York v. Heckler.\textsuperscript{48}

As reports of the large numbers of mentally disabled beneficiaries who had been cut from the rolls poured into their offices, attorneys for the Bazelon Center for Mental Health Law scoured the records of terminated individuals for patterns that could serve as the basis for a legal challenge. Under its evaluation practices at the time, the SSA presumed that, with the exception of persons over the age of fifty, all claimants alleging mental disability whose clinical signs and symptoms were not as severe as the medical standards contained in its Listings of Medical Impairments were capable of performing at least unskilled work. The practical effect was to discount the test of functional and vocational factors in the case of younger claimants and to reduce the disability determination to a simple question of whether the claimant demonstrated the medical findings catalogued in the Listings. The effect was to make eligibility all but impossible for younger claimants, many of whom had qualified under the much looser interpretation of mental disability in place in the early 1970s, before the retrenchment ethos of the late 1970s and early 1980s. Mental health reformers decided to contest the SSA's process for weighing evidence,

\textsuperscript{46} Social Security Reviews of the Mentally Disabled: Hearing Before the Special Committee on Aging, 98th Cong. 164-65 (1983).
\textsuperscript{47} 554 F. Supp. 157 (D. Minn. 1982).
\textsuperscript{48} 578 F. Supp. 1109 (E.D.N.Y. 1984).
arguing that the evaluation violated the Social Security Act because it did not pay enough attention to functional and vocational capacity. It seemed a subtle shift in emphasis, but it had a profound effect on how loosely the standard of disability was applied in the case of the mentally ill. 49

The Bazelon Center and Legal Services filed suit challenging the psychiatric evaluation practices in Minnesota and New York State. Attorneys argued that this practice failed to provide the individualized assessment mandated by the authorizing statute. To bolster their case, they enlisted the aid of mental health professionals who were troubled by the reviews, and who testified that the SSA’s disability criteria were not sufficient to judge the true work capacity of a mentally ill individual. The mental health advocates were successful in both suits. In 1982, the Minnesota District Court overturned the SSA’s psychiatric rating policy, calling it “arbitrary, capricious, irrational, and an abuse of discretion.” 50 Judge Jack Weinstein, the judge in the New York case, was even more stinging in his rebuke of the SSA. He characterized the evaluation process for mentally disabled claimants as a “paper charade,” and castigated the SSA for relying on “bureaucratic instructions rather than individual assessments.” 51 In both cases, the courts found that the SSA had used an improper standard when adjudicating the claims of mentally ill individuals and had therefore wrongfully terminated or denied benefits to thousands of individuals. Both courts enjoined further use of the SSA’s psychiatric evaluation standards and ordered the agency to reverse all denials to class members and re-adjudicate claims under a court-imposed standard of disability.

At the same time that the Bazelon Center pushed class action challenges to the SSA’s evaluation of mental disability, legal services agencies focused on the procedural protections afforded to claimants with mental disabilities—or more precisely, the lack thereof. In the early 1980s, the SSA maintained a strict policy of termination for non-cooperation. If a beneficiary whose file was pulled for review or a claimant who had applied for benefits failed to comply with the agency’s requests for additional information, the SSA reserved the right to terminate or deny benefit

50. Mental Health Ass’n of Minn., 554 F. Supp. at 166.
51. Heckler, 578 F. Supp. at 1124.
payments. Legal advocates argued that the non-cooperation policy was unfair to individuals with mental illness because it did not take into account the unique vulnerabilities of the mentally ill, thus violating their due process rights. Individuals with mental illness, advocates contended, frequently did not answer the SSA’s mailed notices for information because their disorders made them too confused or paranoid to respond. Their silence, however, should not mean they were being uncooperative.

A New York District Court agreed. In Schisler v. Heckler, the court held that the SSA’s non-cooperation policy was unfair to the mentally ill. In keeping with its emphasis on individualized justice, the court asserted that due process required that “procedures be tailored . . . to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case.” The SSA, however, had not altered its notification procedures “to the capacities and circumstances of mentally impaired individuals.” The court ruled that the SSA could not withhold payments on grounds of non-cooperation if an individual’s failure to cooperate could be attributed to her mental disorder unless the agency followed certain procedural safeguards. These safeguards included visits to the claimant at home and efforts to contact family members and acquaintances to obtain the information needed. On similar grounds, several other courts ordered the SSA to re-open and re-investigate the files of thousands of mentally disabled individuals who had failed to appeal their terminations and denials. Although the procedural changes seem small, these decisions made it extremely difficult for the SSA to continue its review of mentally disabled benefit applicants because they made benefit termination administratively cumbersome.

Through the Mental Health Association of Minnesota, City of New York, and Schisler cases, as well as other similar class action suits, the federal courts pushed the SSA toward the adoption of a more individualized and comprehensive disability certification process, one that

53. Id. at 1549-50 (quoting Mathews v. Eldridge, 423 U.S. 319, 349 (1976)).
54. Id. at 1550.
55. Id.
57. Many of these procedural protections were later codified in the Social Security Act in the 1983 amendments and in the SSA’s regulations.
placed greater emphasis on the particular circumstances of the claimant: his actual functional capacity, his work history, and his particular ability to navigate the bureaucratic process of disability application. Standardized processes and rules, like the non-cooperation policy and the use of the Listings, had to take into account the specific circumstances of each mentally disabled claimant.

However, mental health reformers were not satisfied with simply tinkering with the rules of disability certification. They wanted to change the rules themselves so that the individualized emphasis that the courts demanded was codified in the statute and regulations. In this regard, the litigation battle in the courts played to their advantage in Congress. By 1984, public backlash against the reviews, the sheer number of lawsuits, and open warfare between the courts and the SSA over the non-acquiescence policy compelled Congress to act. In the fall of 1983, the SSA confronted 95 pending class action lawsuits challenging some aspect of disability determination. Secretary of Health and Human Services, Margaret Heckler, announced a moratorium on further reviews, and later that year, Congress enacted the 1984 Disability Benefits Reform Act, legislation that built upon the complaints that advocates had voiced through their litigation. The law gave advocates much of what they wanted, including a provision requiring that the SSA rewrite its medical Listings for mental disorders with input from advocacy representatives. A one-two punch of litigation plus legislation, the revision of the Listings of mental disorders further loosened the standards of mental disability, thus hastening the enrollment of large numbers of individuals with mental retardation and mental illness. After the publication of the revised adult Listings of mental disorders in 1985, much of the litigation diminished, but did not disappear entirely. Instead, the courts continued to remain active in disability issues. The judicial liberalization of mental disability after 1984 took many forms, and was accomplished through both class action and individual lawsuits. Although the number of class action suits declined, individual suits took on added importance once the SSA gave up non-acquiescence in 1988.

In some cases, judges loosely interpreted the types of information claimants were required to present in order to justify a claim. For example, the SSA has long maintained that a claimant alleging a disability due to

58. KUBITSCHEK, supra note 33, at 37-38.
pain must provide evidence of a medical condition or source that might
serve as the cause of that pain. In 1988, however, a district court ruled that
psychosomatic pain, pain that an individual with a mental disorder believes
he feels, could be debilitating enough to justify a claim, even if no
objective evidence for the pain existed.60 "[I]f in a person's mind, he
suffers pain," the court held, "then he truly suffers whether the cause and
justification are there."61 Another court ruled that occupational stress,
which the SSA defined as the "demands of work,"62 was not characteristics
of the job, but rather, the claimant's subjective reactions to the job. Thus,
though vocational experts might not consider a particular job too stressful
for a claimant with a mental disorder, if the claimant believed otherwise, he
might not possess the functional capacity to cope with workplace
demands.63 Other courts held that the mere diagnosis of a severe mental
illness along with the subjective testimony of the claimant, was sufficient
to justify an award.64 This, however, flew in the face of the SSA's
assertion that what counted was not the diagnosis of a disorder itself, but
the limitations that that disorder placed on the claimant's ability to function
and earn a living through gainful employment, a determination that, the
SSA argued, it alone had the prerogative to make.

In other mental disability cases, federal judges increased the burden of
proof that the SSA had to satisfy in order to deny or terminate payments.
For instance, courts held that if a claimant stated that he was mentally ill,
the SSA had to treat those statements as evidence of a mental disorder and
weigh it in its adjudication.65 On the other hand, if a claimant denied that
he suffered from a mental illness and refused to seek treatment, those
denials could not be taken at face value since mentally ill claimants "may
be unable to recognize the need to seek treatment."66

Another important line of mental disability court cases developed in the
area of alcoholism and drug addiction, where again the courts loosened the
disability standard. Before Congress eliminated substance abuse as a

61. Id. at 867.
63. Id.
Sec'y of Health & Human Servs., 734 F.2d 930, 935-36 (2d Cir. 1984).
qualifying impairment for Social Security disability benefits in 1996, the SSA classified these disorders as mental disorders. Similar to other mental disorder Listings, the substance addiction standards were revised in 1985, but this set of Listings differed dramatically from the Listings for other mental disorders. Claimants could not qualify for disability benefits based on their addiction alone; instead, they had to satisfy the medical standards for one of nine referenced impairments. A claimant could also be found to be disabled by his addiction if he showed "end-organ" damage, that is, damage to the eyes, heart, brain, or kidneys.

Several district and appellate courts, however, refused to adopt the SSA's characterization. They ruled instead that chronic addiction was a medical impairment, and therefore, could serve as an independent source of disability regardless of whether the claimant satisfied the medical criteria contained in the Listings. According to these decisions, addiction alone was disabling if it was uncontrollable and it prevented the claimant from engaging in gainful employment. The claimant did not have to prove "end-organ" damage or any other physiological or anatomical abnormality.

Other courts, while not explicitly contradicting SSA rulings, narrowed or expanded the evidence that the SSA could weigh when determining whether an addicted claimant could work in a manner that tipped the balance of adjudication to his or her benefit. For instance, according to the

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68. Those impairments included: organic mental disorders, depressive disorders, anxiety disorders, personality disorders, peripheral neuropathies, liver damage, gastritis, pancreatitis, or seizures.


Seventh Circuit, ability to engage in normal daily activities is not indicative of an addicted individual’s ability to work because the conditions of work “are not identical to home life.” The D.C. Circuit, on the other hand, ruled that the SSA must consider the detrimental effect of a claimant’s alcohol related arrests on his desirability as a job candidate. Thus, while the SSA could not look at daily activities, it had to consider arrest records when determining an individual’s work capacity. Similarly, other courts held that failure to complete a treatment program could be proof of chronic and disabling addiction, but bouts of sobriety and past success in a treatment program could not be treated as indicative of an individual’s ability to control his alcohol intake. In the hands of some courts, therefore, evidence that could help a claimant qualify for benefits had to be considered, while evidence that could damage a claimant’s application was ignored or downplayed. Thus, the scale tipped ever so slightly in favor of the claimant, but in a system adjudicating hundreds of thousands of claims, even a slight tip translated, in the aggregate, into a huge expansion in the disability rolls.

VI. CHILDHOOD DISABILITY

The most significant Social Security case is Sullivan v. Zebley, a Supreme Court decision that struck down the SSA’s procedures for determining disability in children after having determined that they were inadequate. The case vastly expanded eligibility for SSI’s program for disabled children and brought with it all types of political controversy and administrative difficulty. The Social Security Act allows disabled children to receive SSI payments if they have an impairment of “comparable severity” to one that would prevent an adult from working. Because children do not work, the SSA decided to limit its determination to its catalog of medical impairments. Because individualized testing of function and vocational characteristics was used to determine the work capacity of a particular claimant, the SSA decided that it was not applicable to a child

73. Purter, 771 F.2d at 698 n.19.
75. 493 U.S. 521 (1990). This was a 7-2 decision with Justice Blackmun writing the opinion of the Court and Justices White and Rehnquist dissenting.
76. Id. at 522.
who was not expected to engage in paid work activity. The children's
determination process, therefore, was a one-step process limited to a
determination of whether the child satisfied the medical criteria in the
agency's Listings.

By the late 1980s, Legal Services attorneys were well versed in the
minutiae of disability determination and they built upon their successes as
they pressed for the expansion of children's disability. In 1987,
Community Legal Services (CLS) of Philadelphia filed a class-action
lawsuit in the Third Circuit, alleging that the SSI children's program was
much more restrictive than the adult program because it did not provide an
individualized test of a child's functioning. CLS attorneys argued that
comparable results required a comparable process. The procedural
differences between the adult and children's program meant that the SSA
was not identifying children whose impairments were of "comparable
severity" to an impairment that would disable an adult. When the Third
Circuit sided with CLS, the SSA appealed to the Supreme Court. In 1990,
in Sullivan v. Zebley, the Supreme Court ruled that the SSA had erred in
not providing an individualized functional evaluation for children.77 While
a vocational assessment was clearly impossible since children did not work,
Justice Blackmun reasoned that the SSA could still assess function by
examining a child's ability to feed herself, dress herself, learn, and play—
activities that Blackmun deemed the "work" of children.78 Shortly
thereafter, the SSA added an individualized functional assessment (IFA),
thus weighing for children, as for adults, the functional capacities of the
individual claimant.

Nevertheless, with Zebley the litigation strategy hit its limits. Unlike
the case of adult mental disability in the 1980s, Congress had not
sanctioned the liberalization of eligibility criteria for children. While some
lawmakers had considered passing legislation to create a functional test for
children in the late 1980s, liberals had failed to cobble together a majority
sufficient to back the proposal.79 After Zebley, legal advocates did not need
congressional sanction; Zebley made the IFA a fait accompli. But, as will
be discussed below, Zebley, along with the numerous other class actions,
contributed to a "crisis" in the disability programs. By 1993, the

77. Id. at 540-41.
78. Id.
79. SSI Disabled and Blind Children Act of 1989, H.R. 868, 101st Cong. (1989);
supplemental security income program to increase limits).
exponential growth in DI and SSI expenditures (especially for children), allegations from congressional watchdog agencies that the SSA was not properly administering the disability programs, and media stories describing children coached by their parents to "act crazy" in order to secure benefits, became too much for lawmakers—especially the Republicans who gained control of Congress—to stomach. In 1996, Congress eliminated the IFA as part of its welfare reform initiative.

VII. OTHER DISABILITIES

Mental disability and childhood disability were not the only areas in which legal advocates utilized their litigation strategy. Numerous boutique law firms specializing in Social Security cases and organizations defending disabled claimants, groups like the SSI Coalition for a Responsible Safety Net and the National Organization of Social Security Claimants Representatives (NOSSCR), sprang up around the country. Attorneys published case material manuals and swapped legal strategies. They established toll-free numbers through which claimants could seek legal aid and share "horror stories."

Moreover, throughout the late 1980s and early 1990s, the federal courts issued rulings that touched every aspect of the DI and SSI programs. Legal advocates brought a number of class action suits challenging the criteria used to evaluate cardiovascular disease,80 AIDS and HIV,81 chronic alcoholism and drug dependency,82 pain,83 diabetes, and hypertension.84 Attorneys also disputed routine administrative details, including the methods for calculating the amount of SSI payments,85 counting veteran’s benefits,86 determining whether the claimant’s impairment has lasted for twelve months or longer,87 and the meaning of a "severe” impairment.88

By the end of 1992, the SSA confronted forty-six threatened or pending

83. Hyatt v. Sullivan, 899 F.2d 329 (4th Cir. 1990); Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987); Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984).
84. Hyatt, 899 F.2d at 329.
86. White v. Shalala, 7 F.3d 296 (2d Cir. 1993).
87. Titus v. Sullivan, 4 F.3d 590 (8th Cir. 1993).
class action lawsuits dealing with issues related to its disability programs. Indeed, that year, the Congressional Research Service observed, "[t]he Federal courts' influence is so extensive that SSA has difficulty contesting the many decisions rendered against it." More than ever, by the late 1980s and early 1990s, policy change in Social Security disability was driven by the courts rather than Congress.

VIII. THE TRADEOFFS OF LEGALISM

Despite the changes in disability determination that resulted from their litigation campaign, advocates remained dissatisfied with the process. The drive to reform Social Security disability through the courts spawned its own problems. Gay Gellhorn writes:

Disability determination has to change. The process costs too much and takes too long. . . . Although the system accomplishes its purpose of sustaining millions of very poor, disabled people, it does so at costs that are unacceptable to nearly everyone. From the claimants' point of view, there is a crisis of confusion and delay. They do not understand how to navigate the system successfully, why it takes so long and why different levels of the same agency reach opposite conclusions.

Gelhorn's sentiments were not confined to the advocacy community; both within Congress and the SSA, policy makers, especially during the 1990s, expressed concern that the administration of the disability programs was on the verge of collapse, and that major reforms were needed to bring the programs under control. Although this is not entirely the fault of the courts, the judicially driven nature of DI and SSI's expansion certainly exacerbated the inherent weaknesses of disability determination and gave rise to current concerns. The accumulating layers of court decisions and ad hoc administrative responses to court decisions resulted in fragmented disability standards, uncertain and confusing administration, an overall lack of policy coherence, and unpredictable expenditures.

90. Id. at 4-5.
IX. FRAGMENTATION OF POLICY

The American federal judicial system is highly fragmented. The judges who sit on the nation's district courts and circuit courts set precedent in their regions with relatively little oversight from the Supreme Court. Only the decisions of the Supreme Court apply nationwide; otherwise, the legal precedent is binding only within the district or circuit in which it is issued.

The balkanization of the federal court system is one of the reasons that the SSA strongly resisted judicial intervention into disability policy, and why it clung to non-acquiescence despite staunch public opposition to the policy. According to the SSA, this fragmentation had the potential to replicate itself in a fragmentation of policy, as the courts became more insistent in articulating their own alternative standards of disability. The SSA argued that Congress had charged it with administering a nationally uniform program and that it would be "abdicing its responsibility if it turned over the determination of agency policy to each of the 94 district courts or 12 circuit courts that might render an opinion on the issue."

Trying to tailor administrative practices to the controlling precedent in each region would be difficult, confusing, and inefficient. As the acting commissioner explained to Congress: There would be enormous practical problems with circuit-by-circuit acquiescence since we would need to keep track of applicants as they move through the decisionmaking process, determine which circuit law should apply, and separately handle claims by jurisdiction. Special problems could arise where there are conflicting decisions within a single circuit, or a claimant or beneficiary changes residence while a decision on appeal is pending.


Judges, of course, were focused on individual justice, not administrative convenience, but this left them free to ignore the extent to which fragmentation was itself a disservice and an injustice to the claimants they sought to protect.

Fragmentation, moreover, was not simply a matter of administrative inconvenience; it contravened everything the SSA and the concept of Social Security represented. For SSA officials, social insurance was an improvement on public assistance precisely because it did not entail the interstate variations in benefits levels and eligibility requirements that characterized the state assistance programs. National uniformity, in other words, was the distinguishing characteristic of Social Security, embodying the respect and dignity that SSA officials believed beneficiaries should be accorded. From the standpoint of equity, the SSA argued, it would be confusing as well as unfair to claimants and beneficiaries "to subject claims to different standards depending on where they reside."

Congress did not settle the issue of non-acquiescence when it enacted the 1984 disability amendments. But under mounting pressure from the courts, the SSA finally capitulated and adopted a policy of intra-circuit acquiescence in late 1988. As a result, the fragmentation of policy standards intensified. Martha Derthick explained that from then on "there were to be two disability determination processes—one bureaucratically controlled and nationally uniform in application, the other judicially controlled and potentially varying among the circuits."

In 1992, surveying the state of the Social Security disability programs, investigators at the Congressional Research Service reported to Congress, "[d]ifferent standards are now in operation across the country depending on the judicial circuit in which someone lives."

94. MARTHA DERTHICK, AGENCY UNDER STRESS 141-42 (1990). Even though it was a means-tested program, these nationalizing goals had been folded into SSI when that program was created in 1972.


97 DERTHICK, supra note 95, at 149.

98 KOITZ, supra note 89, at 4-5.
X. UNCERTAIN AND CONFUSING ADJUDICATION

Extensive judicial involvement in disability adjudication also contributes to the present uncertainty and confusion in the disability determination process. Judges enjoy a great deal of decisional autonomy. While this frees them to make tough, unpopular choices, it can also prevent them from providing clear and consistent guidance as to what practices constitute proper standards for evaluating disability. While judges are technically bound by precedent, they still do not speak with one voice. A judge can always change her mind, and the decision in a particular case can hinge on which judges happen to be sitting on the panel. It comes as no surprise, therefore, that courts within the same circuit sometimes establish internally conflicting standards.

For example, in the early 1980s, the Second Circuit was unable to articulate a consistent rule regarding the evaluation of disability in which pain was a factor. In 1980, it held that allegations of pain need not "necessarily [be] supported by 'objective' clinical or laboratory findings"\(^\text{99}\) and that "subjective pain may serve as the basis for establishing disability, even if such pain is unaccompanied\(^\text{100}\) by clinical findings. Three years later, however, it retreated from this position, ruling instead that "some impairment [relating to the pain] must be medically ascertain\[ed]."\(^\text{101}\) That same year, the court changed course again, restating that pain could serve as the basis for an award even if unsupported by objective medical evidence.\(^\text{102}\) In addition, in mental disability cases, judges have struck down medical conclusions that administrative law judges (ALJs) have drawn from the evidence, ruling that it is inappropriate for lay hearing officers to play "amateur doctors."\(^\text{103}\) Meanwhile, others have held that it is perfectly acceptable for ALJs to draw reasonable conclusions regarding a

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100. \textit{Id.} at 704 (quoting Marcus v. Califano, 615 F.2d 23, 27 (2d Cir. 1979)).
claimant's medical condition based on the evidence available. What is a disability examiner or ALJ to do given these contradictory signals?

Federal judges might not be overly troubled by intra-circuit conflict, believing that it will eventually be sorted out. But in the interim, internal conflict leads to confusion among state disability examiners and ALJs. Since they do not know beforehand what the judge who might eventually hear the case will think or expect they have no assurance that their decisions will withstand judicial scrutiny. Thus, even if adjudicators wanted to follow the dictates of overseeing judges, they still might not know which judges to follow. Moreover, when courts are inconsistent, claimants and their legal representatives are at a loss as how to prepare their cases, and thus, may conclude that the process is arbitrary and unfair.

XI. LACK OF POLICY COHERENCE

In his influential book on the effect of courts on social policy, Donald Horowitz argues that judges tend to tackle social problems in a discrete fashion. By presenting only one aspect of a policy question that often requires comprehensive solutions, litigation "isolate[s] artificially what in the real world is merged." Because the remedies that courts provide fail to take into account the complex connections between social problems, they can result in incoherent policy at best, unforeseen and detrimental results at worse.

This lack of coherence and its political consequences can be readily seen in the controversy that engulfed the SSI program in the early 1990s. The courts focused their rulings on the standards for a disability determination: whether the SSA used the right standards or whether the agency had gathered appropriate evidence when making decisions regarding eligibility for payments. But for the SSA, adjudication of initial disability claims was only one of the many responsibilities that accompany the administration of DI and SSI. In the early 1990s, the agency was also charged with conducting periodic reviews of the disability rolls, referring disabled addicts to treatment programs, and referring younger disabled claimants to vocational rehabilitation programs. Lawmakers saw these obligations, not as separate from, but as an integral part of the Social Security entitlement. Retaining these corresponding obligations, they

105. HOROWITZ, supra note 19, at 73.
hoped temporarily disabled claimants would not look at the disability check as a way of life, but rather as a stopgap measure that allowed the claimant to rehabilitate.

The numerous court decisions handed down in the early 1990s, however, severely compromised the SSA's ability to perform these functions well or at all. They bombarded the SSA with additional administrative tasks that taxed its capacity to do anything other than process the claims that the courts foisted onto the agency. As part of the settlement in Zebley, for instance, the district court overseeing the case ordered the SSA to contact each of the approximately 450,000 children it had denied between 1980 and 1990, and offer them the opportunity to re-determine eligibility. It also required the SSA to conduct a publicity campaign informing disabled children and their parents of the liberalization in program standards. The campaign was so successful that in 1994 alone, SSA field offices received almost a half million applications from children. Because of the retroactive and new claims arising from the publicity campaign, the SSA faced a backlog of over 500,000 children's claims to be adjudicated that year. This represented four times the children's caseload the SSA was accustomed to handling in a typical year. Several other courts during the same time period ordered the SSA to re-open and re-adjudicate the claims of tens of thousands of class members, some with claims stretching as far back as a decade.106

At the same time that the courts and a downturn in the economy produced an increase in initial and retroactive claims to be processed, the SSA was massively downsizing, leaving it ill-prepared to handle the surge in applications.107 Administrative capacity was not, however, a factor that courts considered when they handed down their decisions. Indeed, many legal scholars argue that it should not be.108 Failure to consider capacity, nevertheless, can wreak havoc on program administration and policy outcomes. For instance, congressional investigators estimated that in 1993, the SSA confronted a backlog of well over one million disability claims.


107. Staff at state disability determination agencies has remained fairly constant, but applications have increased from about 1.2 million to close to 2 million between fiscal years 1988 and 1993. See generally Notices: Process Reengineering Program; Disability Reengineering Project Plan, 59 Fed. Reg. 47887, 47891, 47893-94 (Sept. 19, 1994).

This was an unprecedented situation. It represented four times the number of backlogged cases the SSA carried during the workload crisis of the mid-1970s when the agency struggled to implement SSI. Because of these workload pressures, the SSA diverted its resources away from its periodic reviews. The same staff that processed initial applications also processed the reviews, and the SSA simply did not have the resources to do both simultaneously. Other important responsibilities—the referral of applicants to vocational rehabilitation and of addicts to treatment programs—never high priorities of the agency in the first place, fell by the wayside.

The workload crisis was not only the result of the courts—Congress contributed by repeatedly cutting the SSA’s administrative budget throughout the late 1980s and early 1990s. But the courts—by rendering their decisions absent consideration of what other courts were doing, of the economic context in which they operated, and of the complexities of disability adjudication—remained blithely inattentive to practical administrative constraints. While insulation from the rough and tumble of politics can be a virtue of the courts, it can also become a liability when judges are insensitive to the ways in which their decisions can dictate agency priorities and, in turn, affected program politics. In the case of SSI, rushed processing of applications and neglect of the periodic reviews helped fuel media allegations of fraud and abuse, of parents coaching their children to “act crazy” to win awards, and of addicts shirking requirements that they attend treatment programs. The allegations of fraud and abuse abetted conservative attempts to retrench SSI, and in 1996, Congress restricted eligibility for disabled children and addicts. Moreover, this disjointed approach to disability—in which awards were divorced from corresponding obligations, treatment, rehabilitation, and review (functions that ensured program integrity and responsible behavior on the part of recipients)—was not what lawmakers envisioned for the Social Security disability programs. It is also likely not what judges would have wanted had they stopped to ponder disability holistically.

109. KOTZ, supra note 89, at 17-18, 60.
XII. UNPREDICTABLE EXPENDITURES

A final drawback to the court-inspired transformation of Social Security disability was its isolation from the very officials who would have to allocate money to pay for that expansion. Because DI and SSI are entitlements, any person whom the SSA found to have met the disability criteria was “entitled” to benefit payments. Throughout the late 1980s and early 1990s, the courts added more and more claimants to the category of persons entitled to benefits, sometimes little by little as in the case of individual lawsuits. On other occasions, hundreds, if not thousands, were added at one time through class action challenges. By one estimate, the case of *Sullivan v. Zebley* alone approximately led to the enrollment of 130,000 disabled children in SSI.\(^{112}\)

Unpredictable judicial action made forecasting program expenditures a frustrating exercise. Spending for both DI and SSI increased unexpectedly in the late 1980s and early 1990s. In 1985, the SSA paid out nineteen billion dollars for DI benefits and seven billion dollars for SSI payments. By 1994, expenditures for disability benefits had reached thirty-eight billion dollars for DI and nineteen billion dollars for SSI. In real dollars, this represented an increase in spending of 59% over ten years for both programs. Considered separately, after controlling for inflation, spending for DI increased by 45% while spending for SSI doubled. When the costs of Medicare and Medicaid (for which DI and SSI beneficiaries, respectively, are eligible) were added, spending for the disabled during the ten year period from 1985 through 1994 had doubled to well over 107 billion dollars.\(^ {113}\) Neither the policy makers at the SSA nor lawmakers in Congress had foreseen these developments.

Caught by surprise, lawmakers were greatly troubled by the surge in disability spending.\(^ {114}\) By 1992, the rapid growth in the disability programs

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112. This number is from March 1, 1994, during which time, the SSA had re-adjudicated 287,900 of the 321,600 children who were members of the Zebley class. It had 33,700 cases left to re-adjudicate. U.S. GEN. ACCT. OFF., GAO/HEHS-94-225, RAPID RISE IN CHILDREN ON SSI DISABILITY ROLLS FOLLOWS NEW REGULATIONS 8 (1994).


114. The expansion in spending that took place after the passage of the 1984 amendments to reform the periodic review process was not unexpected. Although the growth in spending that took place as a result of the revision of the mental disorders listings was difficult to predict—and in fact Congress did not attempt to project costs of this measure—it had provided cost estimates for the other statutory changes.
finally pushed DI and SSI reform onto the congressional agenda. In April of that year, actuarial projections predicted the trust fund for DI could become insolvent in three years if lawmakers took no corrective action. The event focused lawmakers' attention on DI and, by extension, SSI. Though the funding crisis in DI was resolved by reallocating money from the retirement insurance trust fund to the disability trust fund, policymakers and members of Congress continued to voice concern centering on the long-term implications of the expansion in the Social Security disability programs. Indeed, Senator William Cohen, a strong supporter of the disability programs throughout the 1980s, argued that the pace of expansion was both unsustainable and inequitable. "At the same time we have been assuring senior citizens that we will leave Social Security alone," he explained, "a very real threat has been silently creeping up on the solvency of the Social Security trust funds—namely, the unfettered growth of the Social Security Disability Insurance program." The proposals to restrict disability benefits for substance abusers, legal immigrants, and children, that eventually were enacted as part of the Contract with America and welfare reform, gained political momentum as lawmakers considered various ways of reining in the Social Security disability programs.

CONCLUSION

In the hands of mental health reformers and children's advocates, litigation became a tool for leveraging progressive change in the Social Security disability programs. Because of their efforts, DI and SSI became much more liberalized programs, especially for the mentally ill and poor disabled children—two groups of the disabled that in the past generally lacked a strong political presence on Capitol Hill. Not only did advocates manage to expand the disability standards for DI and SSI, but by pushing for an increased emphasis on individual functional capacity, they have also opened the door to individuals who were previously excluded from Social Security through the SSA's restrictive interpretations of mental and childhood disability. Without question, because of the litigation efforts of

advocates, the Social Security disability certification process is more exacting and more thorough today than in 1980. Moreover, thousands more disabled children and adults are provided a measure of income security through the two disability benefit programs.

These positive developments, however, have not come without costs as well. Because the political debate over program expansion occurred within the courtroom rather than Congress, issues of costs and the corresponding balance of the entitlement with certain behavioral requirements (like treatment for addicts) were not considered. This is not to say that Congress would necessarily have considered these larger systemic issues, but they are much more likely to be addressed in the legislature than in the courts, which tend to focus narrowly on individualized justice. Moreover, the courts were unable to articulate coherent criteria for determining disability, leaving disability standards fragmented from one circuit to the next, and from one judge to the next within the same circuit.

Despite all of the tradeoffs associated with legalism, the question is not so much: "How do we undo all the bad things that the courts have done?" In fact, the courts have done many good things as well, for they have improved the disability determination process by making it more rigorous (albeit in part because they do not become bogged down in disagreement over how to pay for these more exacting procedures). They have opened the disability benefit programs to vulnerable individuals who cannot lobby on their own behalf because they lack the political clout, not to mention—because of their disabilities—the cognitive or emotional wherewithal to succeed in such activities. Those improvements came part and parcel with judicial activism in Social Security disability policy. The real challenge of reforming the disability benefit programs, therefore, is how to create a disability determination system that is timely, easy to use, consistent, and uniform without sacrificing the protections for the mentally disabled and disabled children that were put in place and are enforced today by the federal courts. It is a tall order indeed.