The American social welfare system is evolving away from the framework established by the New Deal and elaborated during the civil rights era. It is becoming less focused on income maintenance and more on capacitation. Its benefits thus more often take the form of services, and these benefits must be configured to circumstances of the beneficiary. The system’s interventions less often involve the application of standardized, stable remedies and more often involve provisional efforts coupled with investigation and experimentation. The new trends typically require different organizational forms, and they imply a different ideal of procedural fairness.

Jerry Mashaw’s work of the 1970s and 1980s provided the deepest and most comprehensive analysis of the New Deal regime from the point of view of legal accountability. He developed a general interpretation that incorporated both the New Deal focus on internal administration and the civil-rights-era preoccupation with adjudication and courts. And he applied this conception in detailed studies of what has proven one of the regime’s most intractable and controversial elements – the Social Security disability programs – in ways that both confirmed it and candidly revealed its limitations.

In this essay, we consider how emergent trends fit with Mashaw’s analysis. In some respects, they represent a vindication of Mashaw’s aspiration to accommodate procedural fairness and organizational efficacy. In others, they require substantial modification.

I. The New Deal Regime

A. Basic Structure
The basic structure of the modern welfare state was set in the Social Security Act of 1935. The most salient feature of this structure was its bright-line distinction between labor market participants and non-participants. The Act created two social insurance programs – Social Security Retirement Insurance and Unemployment Insurance – that conditioned eligibility and benefits on prior wage history. It created two public assistance programs – Old Age Assistance and Aid to Dependent Children (later Aid to Families with Dependent Children - AFDC) that conditioned eligibility on means tests.

Unemployment Insurance was designed to provide income support for workers. The other programs were for groups that were assumed to be out of the labor market. The “dependent children” program aimed at single-parent families, who were assumed to be headed primarily by widows, and was designed to enable the widows to stay home with the children. Early expansions of the programs added new categories of non-workers – “dependents” (spouses of retirement insurance beneficiaries), “survivors” (widows and children of deceased workers who were retirement insurance beneficiaries or would have been had they lived to retirement age), and the “disabled”, a category limited to those “permanent[ly] and total[ly]” unable to work.

The statute gave primary administrative responsibility for the social insurance programs for non-workers – the retired, their dependents, and survivors – to the federal government. It gave primary responsibility for the public assistance titles and Unemployment Insurance to the states. When parallel social insurance and public assistance programs for the disabled were added, responsibility for the critical determination of inability to work was given to the states, where it remains today.1

The Act assumed the New Deal’s syncretic understanding of administration, which fused three disparate components in an unstable amalgam.

First, professional expertise. Expertise was understood as practically efficacious scientific knowledge developed and transmitted through universities and professional bodies. The paradigm of expert judgment was a decision by a professional grounded in a discipline like medicine or engineering applying general principles to a concrete problem. Such judgments could be explained only to a limited extent even to peers, and much less

1 The federal government assumed administrative functions other than disability determination for the means-tested old age and disability programs in 1974, when the programs became known as Supplemental Security Income.
to lay people. Their plausibility depended as much on the qualifications of the persons making them as on their terms. Administratively, expertise operated at two levels. At the top of the agency, senior officials made general policy decisions, which they transmitted to subordinates through rules. At the bottom, there was scope for professional judgment when rules ran out, or conflicted. Judgments of this sort by doctors and vocational experts played an important role in the disability programs.

The second element was bureaucracy, Stable, and relatively inflexible rules promulgated at the top would dictate conduct lower down in detail. The Retirement Insurance program is today a paradigm of effective bureaucracy. It determines the eligibility of millions of beneficiaries largely through mechanical computations based on birth and wage records.

The third and final element of the New Deal administrative vision was the administrative hearing as a safeguard. Errors in the New Deal vision were assumed to result from idiosyncrasy – either random mistakes on the part of the agent or some unpredictable characteristic of the claimant not anticipated in the rules. From the beginning, the Act contemplated that disappointed claimants or beneficiaries could obtain review before a professional and independent official in both the social insurance and means-tested programs. Since error was presumed to be idiosyncratic -- unrelated to the systematic operation of the bureaucracy from which it issued -- it followed that the detection and correction of error was unlikely to suggest improvement of administrative operations. Each case of error could therefore be assessed and remedied in isolation by officers removed from line administration.

By the late 1960s the retirement and unemployment insurance programs were politically entrenched and widely admired. But the means-tested program for families and the disability programs became increasingly controversial; and it was the response to these controversies that led to the reformulation of the New Deal administrative amalgam.

The family welfare program – AFDC – had expanded far beyond expectations to become a critical form of income maintenance for the large class of working-age nondisabled adults who lacked a secure foot in the labor market. Its administration at the state level was widely perceived as arbitrary, intrusive, and racist. The disability
programs had also expanded beyond expectations. The basic eligibility standard – “permanent and total” disability – was supposed to be severe but proved ambiguous. The program was deluged with marginal cases and had difficulty deciding them consistently. An elaborate four-stage review process for denials was motivated by desire for scrupulous fairness, but the high rates of appeals at all stages and reversals at two of the stages communicated a sense of disorder.

Civil-rights-era developments tended to tip the balance between expertise and bureaucracy toward bureaucracy at the front line, while entrenching the role of the hearing as a safeguard against errors in regimes of increasingly exhaustive general rules. The activism of the civil rights era focused on maladministration of the means-tested programs at the state level. The tendency of reform was to tip the balance between professionalism and bureaucracy more toward the latter and to elevate the role of the independent hearing officer as a safeguard against error. Two reforms in AFDC were especially salient.

First, in *Goldberg v. Kelly*, the Supreme Court confirmed the role of quasi-adjudicatory hearings as the principal form of rights protection in welfare programs. This was basically the role envisioned in the Social Security Act. The Court’s innovations were that the hearings mandated by the Act would often be constitutionally required and that sometimes (depending on the importance of the benefits and the reliability of the line decision-making process) they must precede termination of benefits (rather than, as the Act permitted, follow it). The *Goldberg* jurisprudence also emphasized the importance of differentiating the hearing officer line administration from the line decision-making process.

Second, activists sought to eliminate frontline discretion through imposition of relatively inflexible rules. This was initially a liberal project, conceived as a response to concerns of racist abuses of administrative discretion. But beginning with the Nixon administration, conservatives, fearing that frontline workers would abuse their discretion to favor marginally qualified applicants, allied with the liberal proponents of more specific rules.²

² A partial counter-trend to the move toward rules can be seen in the suggestion that a fairness issue of constitutional magnitude might arise when inflexible rules resulted in the arbitrary under-inclusion of
The upshot of this alliance was that professional judgment was gradually eliminated from line decision-making in programs providing monetary benefits. The welfare workers job was re-designed as clerical, so that social workers were not needed. Something similar, though less pronounced, happened in the disability programs, as the roles of vocational and medical experts was strongly reduced by the regulations dictating decisions on the basis of a limited number of specifically defined contingencies – the “listed impairments” and of the vocational “grid” regulations. There were, to be sure, limits to the resulting bureaucratization of administration, as the proliferation of rules created, by their conflicts, new opportunities for ground-level discretion even as they limited existing ones. But the residual professionalism and discretion of eligibility workers, like other “street-level bureaucrats” (the classroom teacher, the case worker, the officer on the beat) -- was increasingly seen as an unfortunate cost of operating a bureaucracy serving complex goals, rather than a valuable resource for contextualized decision making.

B Mashaw and the Right to Good Administration

In seminal work from the 1970s through 90s Mashaw elaborated an innovative synthesis of these developments, showing how the new form of administrative organization could serve the constitutional values at stake in Goldberg. v. Kelly. His starting point, in The Management Side of Due Process, was the emphasis in Goldberg on the need to ensure the effectiveness of constitutional remedies — in this case the hearing -- by tailoring them to the actual circumstances of the groups whose rights were at risk. It follows, he argued, “that when due process cannot be assured by trial-type hearings, additional or different techniques for assuring fairness become appropriate.” In the setting of social service provision these “different techniques” were likely to be measures integrated with line administration, which detected and corrected potential errors before they resulted in final, right-infringing decisions. When hearings cannot assure the

needy people in welfare programs. The Warren Court’s brief flirtation with the “irrebuttable presumption” doctrine is the most salient manifestation. However, this concern seems to have been reconciled with bureaucracy by the premise that, where lower-level complex judgment was desirable, it should, or at least could, be confined to hearing officers in a setting differentiated from line administration.

Mashaw, Managerial Side, at 810
necessary accuracy of administrative decision-making, Mashaw concluded courts should impose a “comprehensive quality assurance program” by way of remedy.\(^4\)

The two arguments — that hearings modeled on courtroom proceedings were unlikely to serve the required due-process values, while institutionalized self-correction often could—rested on empirical claims. As to the inadequacy of hearings in social services, Mashaw pointed to the appeal rate, implausibly “negligible” (apart from three exceptional states) in an error-prone system like AFDC.\(^5\). A hearing system, even if well implemented, could not, he reasoned, provide a reliable safeguard where beneficiaries lacked the ability to identify appealable issues or the psychological or material resources to pursue appeals.

As to the feasibility of institutionalizing error correction within line administration, Mashaw pointed to then-current practice in the Social Security system and the Veterans Administration. The Social Security Bureau of Disability Insurance, for example, made “case development” a cornerstone of its reviews. Thus, decisions for which there was inadequate evidence in the case file were immediately classed as defective. But even when the file supported the decision, the possibility remained that the record itself was defective. To reduce this risk a specially trained group each month redeveloped 1,000 recently adjudicated claims \textit{de novo}, seeking the best available evidence on all relevant issues. Significant discrepancies between the reviewers’ findings and the line officers’ decisions triggered investigation of the possibility that the routines for information gathering were defective and in need for reform.

Quality control at the Veterans Administration focused less on unearthing information ignored by routine collection methods and more on inducing local and regional managers — and occasionally their superiors — to agree on and consistently apply criteria for decision-making. A key component of the Statistical Quality Assurance System was a daily review of a random sample of each local unit’s work product by a reviewer attached to the regional office. Reports on errors were sent to the regional office and the deciding caseworker, and the national Office of Appraisal. The national Office scanned the reports, looking for trends. But it also conducted its own monthly,

\(^4\) ibid.
\(^5\) idid, at 811.
random-sample review of each station’s work. Discrepancies between the patterns of error detected in these reviews, and those reported by the regional reviewer raised questions about the quality of local self-monitoring and triggered further inquiry at the regional and station levels. At the same time the practice of returning each file judged to contain an error to the initial adjudicator compelled clarification (and presumably thereby also modification) of policy. The initial decider could agree or disagree with the review finding. In case of disagreement, the dispute passed to higher authority for resolution.

These demonstrations of the feasibility of organizational or managerial responses to due-process concerns were all the more significant because of concurrent innovations in judicial remedies in cases of persistent institutional failure implicating constitutional rights. Mashaw noted that in a line of custodial-care cases involving prisons, juvenile detention centers and homes for the mentally disabled, it was becoming “increasingly commonplace” for courts to respond to continuing abuses by requiring submission of a plan for reform while retaining jurisdiction to ensure the plan was carried out. Abram Chayes would very shortly thereafter characterize such intervention as “public law litigation” and Owen Fiss, as the “structural injunction”.

For Mashaw, the similarities between these custodial-care cases and the situation of AFDC were “striking”: The triggers for official intervention were the same: “Program performance is widely considered to be much below par; constitutional rights of a ‘basic decency’ or ‘fundamental fairness’ sort are involved; the programs are viewed as reformatory or supportive, their performance evaluated in terms of those purposes; and administrative attempts at reform have failed to deal with the special conditions of the populace which is served by the program.” So too were the remedies. In requiring “that certain management functions be routinely carried out by qualified staff as a means for ensuring a continuous program performance which is up to minimal professional standards,” he observed, the courts’ remedial approach in the custodial care cases “has much in common with a quality control system.”

In expressing optimism about such reforms, Mashaw, Chayes, and Fiss were swimming against the intellectual tides of his day. The leading students of organization, and public administration in particular, were concluding that bureaucracies were incapable of learning. In the following years, James Q. Wilson published influential
studies of the police, the FBI, and narcotics agents arguing that supervisors’ inability to observe, let alone review, the decisions of subordinates left scant possibilities for managerial control of behavior.

Yet, Mashaw stood his ground in Bureaucratic Justice (1983), a report on his continuing study of ground-level decision-making in the Social Security disability system published almost a decade after the “Managerial Side of Due Process.” The book contrasted decision-making in two states. In one the disability insurance administration was part of the state welfare department, and its personnel had the same low entry qualifications and was classed on the same low pay scale as other social welfare workers making eligibility determinations. In the second, the administration was part of the state education department; examiners were classed as “counselors,” expected to hold or acquire a master’s degree in vocational counseling, were paid accordingly, and in consequence had a more “professional” outlook on their jobs. The difference in outcome was dramatic. In the welfare agency, line examiners prioritized rapidity above all else (as delay was the easiest error for supervisors to detect), which resulted in an “atrocious” QA rate. In the more professional administration “there was continual discussion among examiners and with supervisors and medical consultants about ongoing cases and problems.” The QA error rate was among the lowest in the country. Although such comparisons are inevitably incomplete, the strong suggestion is that, at least under favorable conditions, some forms of “professional” autonomy in combination with the feedback of “quality control” can produce reliable, institutional learning.

It is the promise of this capacity for internal self-reflection and correction, as opposed to accountability achieved through political oversight or judicially styled review, that undergirds Mashaw’s renewed call in Bureaucratic Justice for a “‘right”’ to “good administration.” The question hanging fire at the end of the book, and still now (and the reason “right” is in scare quotes), is how, if at all, this right is to be vindicated.

But bold and resolute as he was, even Mashaw could not foresee from the vantage point of the 1980s the transformation that was occur in social welfare and the very nature of organizations in the ensuring decades. In several social welfare programs, the

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6 Ibid, 161-162.
7 Ibid, 226-227.
emphasis would shift from monetary benefits and eligibility decisions to the provision of complex services to help individuals and families face diverse risks over their life course. In “quality control” the focus of concern would extend from the question, are we executing the rules and routines as intended? to the question, do the rules and routines serve the intended purposes? The information exchanges across organizational levels prompted by these questions would transform the bureaucracy and begin to give new meaning to the very idea of a rule. All this would make Mashaw’s right to good administration more urgent, more demanding—and more feasible.

II. The Service-Based Welfare State and the Post-Bureaucratic Organization

The New Deal welfare state that Mashaw described and the economy to which it is addressed are undergoing profound changes. In circumstances of uncertainty — the inability to predict, let alone estimate the probability of future states of the world — organizations in both the private and public sector are becoming more responsive to changing circumstance. They do this by authorizing — rather than as in bureaucracy silently tolerating — the exercise of discretion in the application of rules at the ground level but requiring that these decisions be made explicit and justified in light of the decisions of others in similar circumstances. For the welfare state the rise of uncertainty means an increase in non-actuarial risk -- the risk of harms to various groups in the population too unpredictable to allow for risk sharing through insurance-type programs. Thus, we see a gradual shift to the prevention of harm rather than the palliation of its effects.

More precisely, the shift is from provision of welfare benefits in the form of grants — compensation for loss or harm — to services designed to enable citizens at various points in the life course to acquire the skills and other capacities they need to master and mitigate the risks they face. As risks are typically rooted in compound problems — labor market difficulties are compounded by financial or family stress and educational deficits — the services provided have to be tailored to the needs of particular groups, and revised as the diagnosis of problems changes in response to the effects of “treatments.” These changes have been re-enforced by changes in the self-understanding
of beneficiaries themselves, who increasingly insist on active participation in social life rather than support for passive existence.

Dramatic increases in the claims for work-related disability insurance in the OECD countries in the last decades clearly illustrate the limits of the traditional welfare state model. In the Netherlands, Denmark and Norway, among others, the provision of services adjusted to individual need have had significant success in mitigating the harms and costs of such disability. In the US, for reasons that Mashaw clearly foresaw, the defects of the insurance model have been especially egregious and hard to correct. Call for reform draws on and point to the successful examples of the alternative approach.

A. From Grants to Services

Take first the general shift in welfare provision. A first and crucial indication of the shift from compensatory remediation to capacitating prevention is the increasing importance of education at all levels as the very foundation of welfare. In the original post-War conception, education was often ignored in discussion of the welfare state. As most workers were expected to acquire skills on the job or through some form of apprenticeship or other vocational training, education through secondary school, and of indifferent quality, was assumed to be sufficient. Today it is difficult, if not impossible, to acquire robust skills by advancing over a period of years from one job to another; vocational training typically requires more than basic levels of literacy and numeracy; and skills, once acquired, have to be renewed through mastery of new methods. In addition, unemployment is less manageable through macroeconomic interventions than once hoped, and structural adjustments — abrupt shifts in the conditions of competitiveness of whole industries or branches of activity, with attendant devaluation of skills -- more frequent than once assumed. Employability for the general population accordingly depends on much higher educational initial attainments than before.

The No Child Left Behind Act of 2001 invoked egalitarian and anti-poverty values as the central rationales for federal intervention. A measure of the recognition of these changes is the intense international attention accorded the PISA quadrennial comparisons of the degree to which national school systems provide problem-solving skills to students from diverse backgrounds. The increasingly urgent focus on early
childhood education in US and elsewhere is motivated by concern that primary schooling may begin too late to correct cumulative cognitive deficits resulting from family life that does not spontaneously create the prerequisites for further learning.

A second and related indication of the shift in welfare provision is the growing importance of activation programs: measures that help those who have lost (or never had) jobs and cannot find employment because of lack of skills, or physical or mental disabilities, or advancing age. The emphasis on activation reflects the realization that the New Deal’s categorical distinctions between workers and non-workers are untenable. Reformers increasingly assume that the only way to make the welfare system economically and politically sustainable is to encourage and support the long-term unemployed, or those at risk of becoming so, to find work. Typically these programs combine disincentives to moral hazard or shirking (time limits and caps on benefits) with incentives to work (the possibility of combining some continuing benefits with a share of wages earned from part-time employment) as well as bundles of training, health care or family support services as individually needed.

In the Social Security Act programs, the line between workers a non-workers has broken down in the Social Security Act programs. Various work incentives and/or requirements were added to AFDC until the program was redesigned in 1992 as Temporary Assistance to Needy Families. The new program contemplates only short-term assistance while the beneficiary prepares undergoes job preparation and training. The Retirement Insurance program originally offset benefits by earnings, but the offset was cutback and then eliminated. The disability programs, despite their nominal limitation to “permanent and total disability”, have introduced accommodations designed to encourage work. Many proposals now under debate would move the program toward “a community-based and multidisciplinary approach that would deploy financial assistance, medical care, and rehabilitation and transportation services, among other things, to promote the overall well-being and highest possible functioning of disability beneficiaries.”

And although Unemployment Insurance has always been oriented to workers, the New Deal assumption that it would be sufficient to provide income support

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to the unemployed has eroded. Training and education programs have developed and expanded to complement income benefits.

Such programs are often controversial because the punitive, cost-cutting (and often stigmatizing) measures against moral hazard can dominate provision of support services. But in Europe, where these developments started earlier, there are notable, well-documented successes of service-intensive programs addressed to groups “far from the labor market,” such as workers above the age of 50 with low education levels, long spells of unemployment and chronic health problems.⁹

B. Post Bureaucracy: Experimentalist Organization

The new regime requires more organizations more adaptive to fluidity and diversity. Organizations configured for such adaptability can be widely observed in the contemporary welfare state. They are central to the recent initiatives in education and welfare oriented to labor-market capacitation. They can also be observed in other public programs not focused on employment, such as child protective services and policing. There are many variants of the revised architecture. One that we regard as especially promising involves significant transformation of each of the three elements of the New Deal amalgam.

Professional Expertise: Professional judgment in the old paradigm was applied mainly at the top and only exceptionally and discreetly at the bottom (for example, medical evaluations in disability). It was assumed to be substantially ineffable and inarticulable. Expertise in the post-bureaucratic service organization is different.

First, expertise is seen to be as necessary at the bottom of the organization as at the top. The insufficiency of current rules and routines, and possible alternatives to them, are often first manifest at the ground level. Ground-level decision makers need autonomy and training to make sense of and act on what they encounter

Second, in the new service architecture, difficult decisions are not made by a lone professional but by an interdisciplinary team. The team will include people with qualifications in multiple fields. In general, the team’s parameters will be defined by the problems it addresses rather than by the background of any of its members. For example, in some of the leading child welfare departments, the case worker’s main function is to convene the team, including key members of the child’s family, the child herself, a mental health professional, an official of her school with close knowledge of her performance, and so on. It is the team, not the caseworker alone, which establishes and revises treatment plans.

Moreover, the reasoning and the judgments of these teams is expected to be explicit. There is much less deference to ineffable knowledge and credentials than in the past. This is partly a consequence of the multidisciplinary nature of the teams. Since the members do not share a common professional background, they must articulate for each other things that they might have thought unnecessary to explain to colleagues in the same profession. Finally, while professional knowledge was traditionally assumed to be relatively stable, with certification at entry taken as evidence of qualification for the length of a career, professional knowledge is today seen as evolving rapidly. Learning is understood to occur throughout the career.

Bureaucracy. Reliance on the autonomy and expertise of front-line decision makers — the very street-level bureaucrats seen as the bane of the old order — goes hand in hand with a new understanding of rules and a break with traditional bureaucracy. The new regime could be described as post-bureaucratic. Post-bureaucracy seeks more flexibility than the traditional understanding of rules allows but more accountability than the low-visibility discretion that shadowed and supported traditional bureaucracy affords.

In the new service organization, rules are comprehensive but rebuttable. All important aspects of practice are in principle governed by explicit rules. This makes it easier for newcomers to learn practice; it permits comparison of practice across sites; and

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10 The move to articulation reflects further changes in attitudes toward expertise. Skepticism toward the presumptions of traditional professional knowledge is widespread. At the same time, changes in communications and information technology have increased the capacity to test and develop professional knowledge. Thus, practice in the service professions has become more “evidence-based.” Such practice requires that judgments be formulated in a way that facilitates assessment in the light of experience, and assessment is only possible when premises are explicit.
contributes to accountability by making practice transparent to the public. Frontline workers, however, are instructed not to follow the rules when doing so would frustrate the program’s purposes. However, they cannot exercise this discretion in the shadows. When they depart from a rule, they must signal their departure in a way that triggers review. When the departure is sustained, the rules get rewritten so as to provide explicitly for the contingency that warranted departure.

Encouragement and review of principled rule departures is one of a series of procedures designed to force continuous reconsideration of the rules. In each case, perceptions of anomaly or error or inefficacy are treated diagnostically as symptoms of potential systemic dysfunction. The symptoms are subject to various forms of root cause analysis, and revisions are made promptly where opportunities are discovered.

Another type of such review is triggered by unexpected outcomes or “significant operating events”, to use the term employed in the nuclear power safety regime. In the service-sector, this type of review is best established in medicine in the form of adverse event and “mortality-morbidity” reviews. But it is currently gaining prominence in other sectors. In child welfare, injuries to children in custody are investigated in this manner. In policing, “use-of-force” procedures are designed on this model.

Rule reassessment is also induced by proactive audit-type analysis of particular cases or decisions. The Quality Service Review (QSR) process that has been applied in several child protective service and mental health systems is a notable example. The QSR might be considered a more encompassing variant of the redevelopment of eligibility decisions by the Bureau of Disability Insurance that Mashaw described. A QSR typically involves two reviewers, one from a different division of the child welfare department, the other an outsider with relevant expertise. Together they redevelop the decision-making process in a particular case (included in a stratified random sample of a unit’s work product) by scrutinizing the file and interviewing key participants, including the children in departmental care, family members and service providers. The review assesses whether the decision-making team is composed and functions as intended, as judged especially by timely responses to shortcomings in initial arrangements, and whether the decisions result in the child’s well-being, as judged by performance in school and discussion with care givers. Results are then discussed with the case worker and her
manager to correct errors of interpretation, uncover possible training deficits, but also so clarify possible modifications of procedures.

Performance measurement can also trigger root-cause review. As the in QSR, performance measurement typically combines metrics capturing various aspects of the adequacy of the decision-making process as well as metrics that gauge various dimensions of outcomes. In post-bureaucratic organizations the overriding purpose of performance measurement is diagnostic—to detect to draw attention to problems, and possible solutions, that escape notice at less aggregated levels of observation. In education, fine-grained analysis of diagnostic testing can focus attention on unexpectedly bad or good results with respect to particular skills or particular populations, and inquiry can strive to assess reforms that might remedy the problem or generalize the success.

But note that there is a common variant of organizational reform — often referred to in Anglo-American discussion as “new public management”-- that de-emphasizes rules and induces some initiative in middle management while remaining more tied to traditional bureaucracy than might first appear. Like the bureaucracy against which it reacts, new public management remains a principal-agent model of action: It assumes that the principal or senior official can confidently know what needs to be done, and the chief organizational problem is inducing subordinate agents to execute the plan. Outcome metrics displace rules and the designers intend that the discretion opened by the relaxation of rules be used creatively. But the metrics are still set from the top and seldom adjusted to reflect frontline learning. Instead, there is an emphasis on incentives -- carrots and/or sticks. Unsurprisingly, large rewards or punishments for success or failure in meeting narrowly defined targets will also create incentives for perverse behavior – for example, “teaching to the test” -- when the metrics fail to capture important dimensions of goals.

Taken together, the new understanding of expertise, rules and root-cause review cohere in a novel form of organization that breaks with the structuring principles of bureaucracy. Because it must always consider the possibility of systematic problems, root-cause review is by nature multidisciplinary, involving specialists from different functions and levels of the organization. Anyone with relevant experience or expertise is invited to contribute and all contributors are treated equally, as peers. Where bureaucratic
supervision is primarily concerned with adherence to established norms, peer review is primarily concerned with learning and investigation. Where bureaucratic supervision respects and re-enforces internal functional distinctions and levels of hierarchical authority, peer review ignores and thereby undermines both.

Hearings. Recall that in the New Deal model and still more in the legal liberalism of the Warren Court era, adjudication was conceived as the all-things-considered corrective to the formal logic of bureaucratic administration. Mashaw was acutely aware of the disjunction between the modes of decision-making. He thought, as we saw, that hearings as conventionally organized -- complaint-driven, independent of line administration, and targeted at idiosyncratic error — were unlikely to actually function as the full equivalent of a day in court. But he was likewise skeptical that, even subject to the discipline of quality control, “bureaucratic rationality adequately defines justice” for “people who have concluded from concrete and often bitter and demoralizing experience that they cannot work.”

He worried that, without some form of effective participation in decisions concerning them, claimants would not be able to gain cognitive mastery of the substantive issues at stake; nor would they be able to monitor or otherwise sufficiently control proceedings to ensure that the adjudicator “‘really listens’”. As a palliative he proposed that the government furnish claimants with representatives with the same training as claims examiners.

In principle the post-bureaucratic administration of service provision mitigates the tension between the bureaucratic application of general rules and the all-things-considered judgment associated with a day in court. The goal of such administration is precisely to adjust service provision to individual need — to make (and periodically revise) the all-things-considered judgments that a court would make if it had the capacity — which the administration alone in fact has — to consider all things relevant to its decision. When the administrative rule is to make decisions suited to individual circumstance, the tension between bureaucratic justice and individualized fairness vanishes in principle.

11 Bureaucratic Justice, p. 143.
12 Ibid, p. 140.
13 Bureaucratic Justice, pp 200-201.
In addition, post-bureaucratic administration goes at least some of the way towards meeting the values that Mashaw associated with participation. Because decision-making is typically in teams that include the client, some degree of direct participation is assured. Because decision-making is extended and revised in time — not, as in conventional claims adjudication, all or nothing — claimants have the real opportunity to become familiar with norms that concern them, and to observe who listens and who does not. The multidisciplinary character of the team facilitates both learning and monitoring: in explaining issues to one another, the team members provide clarifications that aid the claimant’s understanding, and to the extent that team members hold one another to account, or simply disagree, they provide openings and support for the claimant’s monitoring of team performance.

To the extent that the new architecture functions well, hearings should play a more marginal role. They should not be the claimant’s first opportunity for a direct encounter with a respectful professional decision-maker. Moreover, since hearings officers make decisions with the same methodology as the earlier decision-makers, we would not expect high reversal rates. On the other hand, there is no rationale in the new architecture for the strong institutional divorce of line administration and adjudication. Reversals should be treated as symptoms of potential dysfunctions, not as responses to idiosyncrasy.

C. The Failure of Disability Insurance and the Promise of the Service-Based Alternative

The limits of the insurance-based model of welfare provision are increasingly salient in the disability programs of the OCED countries. As workers exhausted unemployment benefits and — in the absence of effective capacitating services — were daunted in the search for employment, increasing numbers have sought refuge in disability claims. The resulting increase in the disability rolls threatens the solvency of many insurance systems. The US system, despite some modest initiatives to encourage and facilitate work, remains largely tied to an understanding that defines disability as the

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inability to work. By contrast, the Dutch system successfully adopted an activation program that integrates income support with rehabilitation and training. The contrasting trajectories of the two systems illustrate the fragility of the traditional model and the feasibility of reform based on customized services.

In the US, the fraction of the workforce receiving disability benefits had doubled in the decade before the publication of Bureaucratic Justice, and it has doubled again since then. There is no indication that this increase reflects changes in the physical condition of working-age adults. On the contrary, the rate of self-reported disability has remained constant at about 10 percent during this period, and there is independent evidence that the health of working-age Americans has, if anything improved. In fact, disability awards (as in other OECD countries) are now made increasingly to claimants suffering from “subjective” or “non-verifiable” disorders, including mental illness, musculoskeletal disorders such as back pain, and soft tissue pain. The share of these awards in all disability allowances has been steadily rising, from 27 percent in 1981 to 54 percent in 2011. Because they are intrinsically difficult to verify objectively the claims are typically denied at the initial determination stage and awarded at the hearing level. Applicants with these disorders appear to have the greatest potential for ongoing labor force participation. But they, like other beneficiaries, receive no support for re-entering the labor market, and their skills may in any case atrophy while they are awaiting adjudication of their claims. The employment rate of men in aged 40 to 60 with a self-reported disability declined from 28 percent in 1988 to 16 percent in 2008.

The financial consequences of these developments are grave. As SSDI grows it commands an ever-increasing share of the Social Security system budget. In 1989, 10

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15 The 1956 Act creating SSDI defines disability as the “inability to engage in a substantial gainful activity in the U.S. economy.” Mashaw thought “the 1980 amendments may be viewed, in part, as an effort to rebuild linkages between medical, income support and vocational rehabilitation....It is going too far, however, to view the disability program...as an open-ended treatment- or service-oriented program. SSA has not been converted into a comprehensive health and social service agency that can ‘treat’ disabled clients for their multiple health, training, placement, and income security problems.” Bureaucratic Justice, p. 203. The observation still applies.


17 Between 1989 and 2009, the share of adults ages 25 to 64 receiving such benefits rose from 2.3 to 4.6 percent Our account closely follows the excellent study of Autor, D. H. & Duggan, M. (2010). Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System. The Center for American Progress and The Hamilton Project, 1-42.
percent of Social Security expenditures went to SSDI. By 2009, SSDI’s share of total system expenditures was 18 percent. SSDI now spends annually more than it collects from its share of the Social Security payroll tax, and it is projected that the SSDI trust fund will be exhausted decades before the exhaustion of Social Security retirement trust fund. Since both depend on the same tax base the financial deterioration of SSDI is a threat to the system as a whole.

The Netherlands already faced similar problems in the 1980s. In 1990, 3.4 percent of the country’s GDP went to disability cash benefits. The median share in the OECD countries at the time was 1.4 percent; in the US the share was 0.6 percent. The Dutch press began to speak of disability claims as “the Dutch disease.”

The government’s initial response was a series of benefit cuts, chiefly a reduction of the replacement rate of lost earnings (from 80 to 70 percent), and a less generous method for indexing benefits to the cost of living. These measures reduced expenditures on the program, but had little effect on the share of the labor force receiving disability benefits (which declined from 11 percent to 10 percent between 1985 and 1995.).

Two complementary, more thoroughgoing reforms produced a turnaround. The first, introduced stepwise beginning in 1994 and completed a decade later, requires employers to finance the first two years of employees’ sickness benefits. This (together with experience rating of disability insurance, which ties the level of an employer’s premiums to the level of her employees’ claims) created a strong incentive for employers to reduce their liability by providing rehabilitative services and workplace accommodations for impaired workers.

To structure this response, a second reform in 2002 introduced a “Gatekeeper Protocol.” Under this protocol an occupational physician first prepares a problem analysis including an assessment of the medical causes of the patient’s difficulties and the extent of functional limitations, and the prognosis for work resumption. The employer and sick employee use this assessment to draft together a return-to-work plan specifying a goal — resumption of current job, or start at another one and steps to achieve it. They jointly

18 Autor and Duggan, pp. 31-32
19 ibid
appoint a case-manager, and fix a schedule for evaluating and, if necessary, modifying the plan. The plan binds both parties; each can call the other to account in case of a possible breach. Eventual claims on the public disability insurance system are only admissible if accompanied by a well-documented explanation of the return-to-work plan and why it has not resulted in resumption of work. In 2007, nearly 11% of disability claims were rejected, keeping the employer liable for continuing to support the claimant until she returned to work or the failure of a plausible plan has been convincingly demonstrated.21

Together these reforms have reversed the earlier trends. The entry rate into the disability system has fallen from 1.2 percent of the working age population (at the time one of the highest rates of the OECD countries) to .38 percent in 2008 (below the OECD average for that year), presaging a long-term, relative decline in the size of the Dutch disability rolls.22 Indeed, the share of the Dutch labor force receiving disability benefits already fell from slightly more than 10 percent in 2002 to 8.4 percent in 2007.23

A careful recent study of a cohort of 3,736 employees who reported sick around January 1, 2007, and had not returned to (full-time) work 9 months later confirms that provision of rehabilitative services and workplace adjustments under the reformed regime explain this outcome.24 Controlling for a long list of factors that might influence a worker’s decision to (continue) reporting sick, the study found “strong impacts of vocational interventions by employers themselves and by OHS [Occupational Health and Safety] agencies contracted by employers.” Seventy one percent of the sample population resumed work at least partially within 10 months of reporting sick. The key finding is that the new disability regime “spurred the demand for vocational interventions that prevent prolonged sickness, and OHS agencies and occupational physicians learned to meet that demand in increasingly effective ways.” These interventions were especially effective “in the case of health complaints that are difficult to assess objectively.” These complaints

21 ibid, p. 363
23 SSDI program recipients as a share of the labor force is 5.3 percent in the US., which is only 65 percent of the size of the Dutch program. But including non-elderly adults receiving disability benefits from the federal Supplemental Security Income entitlement program increases the share to 7.1 percent. “With the Dutch and U.S. programs now trending in opposite directions, it is indeed possible that the U.S. will pass Dutch disability enrollment in the decade ahead.” Autor et al, p. 32.
24 Everhardt et al, p. 365
“used to be” an important cause of long-term absenteeism and entry into the Dutch public disability program, as they are still in the US.\footnote{ibid, 377.}

Developments in the Netherlands are representative of a broader shift in disability policy, especially salient in the Nordic countries, away from compensation for employability and towards provision of services to support a partial (and where possible an increasingly full) return to employment.\footnote{See Røed, op cit, especially pp 10-11 for an overview and discussion of reform in Norway.} Recent calls for reform of the US system urge emulation of these examples.\footnote{Autor and Duggan, pp. 31-32.}

III. The Due Process Ideal in the Service-Based Regime

Mashaw’s abiding contribution to the discussion of justice in the welfare state is the idea that administrative due process has to be tailored to the circumstances of those to whom a fair process is due, and that the internal organizational resources of administration itself are often indispensible to meeting this requirement. This idea is grounded in his deep knowledge of the Social Security system and other civil-rights era bureaucracies, and crystalized by his reading of Goldberg. The whole body of his work since then should interrupt the lawyerly reflex that responds to every failure of due process or accountability in administration with measures inspired by the image of courts as the \textit{fons et origo} of justice

But we have seen that the nature of administrative organization is undergoing profound change, and so too is the “management side” of due process. These changes suggest amendments to two aspects of Mashaw’s conception of procedural due process. First, what Mashaw called “accuracy” – frontline fidelity to a hierarchically enacted program – has been redefined to include ongoing review of an organization’s purposes and strategies. Second, the trade-off Mashaw sought to calibrate between efficient administration under general rules and consideration of the individual circumstances of the claimant is less central and less severe in the new regimes.

The shift towards post-bureaucratic, experimentalist organizations has changed the nature of error detection and systematic institutional learning in public administration,
and the administration of social welfare in particular, in two fundamental ways. First, the increase in uncertainty has meant that error detection is no longer limited to faults of execution. The root-cause of error may lie in a misconceived goal, not a faulty procedure. The correction of error may therefore require the clarification of the organization’s strategy — for example, a comparison of the effects of different approaches on civil rights and other dignitary values — not just the correction of its managerial routines. Accuracy is measured relative to a fixed target. On-going institutional self-scrutiny induced by such error detection is not primarily a search for accuracy.

Second, even as the scope of error detection generally extends upwards to strategy, the shift from grants towards individualized service provision in social welfare administration extends its reach downwards in that domain into the interstices of ground-level decision-making. Contextualization— the ability to gather information about and respond appropriately to individual cases— becomes the touchstone of administrative performance. Review of that performance— triggered by routine, by explicit departure from the rules, by a disruptive incident or by reports on performance metrics— prompts changes in means and ends. Successful contextualization depends on determining, within the scope of an administration’s jurisdiction, the goals of a particular intervention; so here too open-ended scrutiny of organizational purpose, not accuracy, is the guiding value of error correction.

These extensions in the scope of error detection upward into the macrocosm of strategic choice and downwards to the microcosm of individualized decisions tighten the connections between organizational routines and the larger purposes and values they serve. They typically involve both of Mashaw’s favored reforms – Quality Assurance procedures and face-to-face consultation with the client— in ways that are more complementary than Mashaw assumed.

The possibilities are illustrated in the US in reforms of public schools, child welfare, and the police.

In school reform, No Child Left Behind obligated the states to monitor the annual performance of at-risk populations, and to establish governance systems for devising and revising strategies to improve school outcomes. The statute’s eventual successor is likely
to include these two features. The idea that citizens are equally entitled to pedagogic services tailored to their individual prompted, and takes on concrete meaning through these changes. It partly complements, partly supplants earlier understandings of equality in education tied to racial desegregation or equality of school financing.

In police reform, the most ambitious interventions explicitly reject strategies that assume that nearly all inhabitants in high-crime areas are criminals or associates of criminals (with knowledge of crime that can by disgorged by aggressive tactics) as inherently likely to produce constitutionally risky confrontations. Instead they favor “problem oriented policing”, which strives to target coercive intervention on persistently violent people and to develop a repertory of non-confrontational interventions (for example, environmental redesign). But even the less ambitious settlements routinely agreed between the Department of Justice and police departments challenged for having engaged in a “pattern or practice” of civil rights violations establish use-of-force reporting and early intervention systems to detect at risk officers and supervisors who condone or encourage misconduct. Such findings can in turn prompt reconsideration of the strategies that shape the supervisors’ incentives.

In child welfare, conflicting perspectives and values stalemated debate about strategy for most the last century. Proponents of the “rescue perspective” argued that at the first sign of immanent harm the child should be removed from arguably abusive or negligent caregivers; proponents of the “preservation perspective” argued for caution in the interest of the possible reconstitution of a workable, biological family. Both agreed that administration should in principle serve “the best interests of the child”; but as those interests had proved unknowable in practice, disagreement focused on the default rule to apply to decisions made in ignorance of the relevant particulars. Where contingency planning by multidisciplinary teams has allowed for contextualized decision-making, the traditional debate has lost salience. Instead, attention is focused on improving the routines that support individuation of service provision through QSRs and other means.

The experimentalist and contextualizing aspirations of these programs tends to enlarge opportunities for beneficiaries and stakeholders to participate in ways that connect them directly and deliberatively with officials. These opportunities resonate with
Mashaw’s aspiration for administration that affirms dignity, even though it is too soon to conclude that new threats to this value will not emerge within the reformed organization.

Today, in view of the change in the nature of administration and the enlarged role of error correction, the right to due process requires not just accurate but responsible administration: Administration is responsible if it can defend its choice of strategy as providing the best available combination of effectiveness and respect for dignity. Where — as increasingly the case in the administration of social welfare — individualization of service emerges as the strategy that meets that test — administration is responsible if it systematically improves its ability to contextualize decisions to particular situations.

Such a right to responsible administration is implicit in the public law jurisprudence of the US district courts institutional reform cases — descendants of the early custodial-care cases that Mashaw presciently identified as a promising vehicle for the right to good administration. Now, as then, the trigger for intervention is concern for violation of “constitutional rights of a ‘basic decency’ or ‘fundamental fairness’ sort,” usually compounded by persistent neglect of statutory obligations and the repeated failure of attempts at administrative reform and of political redress generally. Now, as then, the court intervenes by asserting jurisdiction over the inculpated institution, and requires key stakeholders to agree a plan of reform acceptable to the court and to report periodically progress towards implementing it.

What has changed, slowly but profoundly, is the nature of the reformed administration contemplated by such plans. Mashaw was struck in the early custodial care cases with the specificity of the remedies: plans for better lighting, for psychological testing for guards, for rehabilitation. Elements of these remedies had affinities with quality control; but often they focused more on prescribing outcomes than on establishing methods of error detection and correction. In recent decades the emphasis has shifted in the direction of establishing post-bureaucratic organization, with the forms of extended error detection and correction that induce and support responsible administration. This shift is reflected only implicitly in doctrine. It emerges less from the evolution of judicial thinking than from the long-term development of ideas of sound administration in various: the thinking of the experts and stakeholders convened to address chronic administrative failures. But judicial intervention provides an important setting for
sustained reform where wary parties can only regain their autonomy by some measure of cooperation with each other. Leading exemplars of post-bureaucratic reform in child welfare, policing, and education emerged under the aegis of judicial interventions. And these cases demonstrate the feasibility and suggest the promise of the right to responsible administration: the right of the “mass” of citizens to individually contextualized consideration by administration in a capacitating welfare state.

But that right, like the post-bureaucratic form of organization and the new welfare state with which it is entwined, is still nascent. It is precisely in such moments of great plasticity, when rights and administration are in flux, that Mashaw’s teaching becomes uncontrovertible. If we will have due process of administration, it must come from within administration – even as we recognize that administration at its best may not serve all the values that due process demands.