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Administrative Alternatives to Judicial Branch Congestion

By Judge John G. Farrell*

I begin with a story. A building in downtown Manhattan is engulfed in flames. As the fire rages out of control, emergency personnel are not able to reach the workers on the highest floors. Trapped in the inferno, dozens leap to their deaths. The City of New York and the entire nation are shocked and outraged at this senseless tragedy.¹ The tragedy spurs widespread public support for far-ranging legislation, including statutes intended to circumvent the

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1. Eric Behrens, *The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation*, 62 TEX. L. REV. 361, 361-62 (1983); see also The Kheel Center, Catherwood Library, ILR School at Cornell present *the Triangle Factory Fire* (2005), available at <http://www.ilr.cornell.edu/trianglefire/> (last visited Mar. 27, 2007); see also Paula Rosa, *The Triangle Shirtwaist Fire*, available at <http://www.historybuff.com/library/refshirtwaist.html> (last visited Mar. 27, 2007); see also *Photos From The Triangle Factory Fire*, available at <http://teaching.arts.usyd.edu.au/history/hsty3080/3rdYr3080/trianglewebsite> (last visited Mar. 27, 2007).

slow-moving courts and to provide fair and efficient administrative remedies to the perceived victims.²

Although it sounds eerily similar to 9/11³, these events took place in 1911, not in 2001. I am referring to the fire at the Triangle Shirtwaist Company in New York City. It is no exaggeration to say that, in its day, that disaster was nearly as shocking and horrifying to the people of New York and the nation as the September 11, 2001 terrorist attack was to us in 2001. For many years after, many New Yorkers would refer to events as occurring *before* or *after* the Shirtwaist fire.⁴ It is difficult and disturbing to read first-hand accounts of either disaster. I draw the analogy between the two tragedies not solely for dramatic effect, but to illustrate a larger issue.

As I researched the issue of administrative alternatives to judicial congestion, I was struck by the surprising similarities between society's responses to these two disasters. Both tragedies shocked and outraged the city and the nation and inspired strong public support for rapid government action by the executive branch and, in particular, the creation of administrative remedies that would permit victims to avoid court litigation.

In the wake of the Triangle Shirtwaist Company fire, New York State passed sweeping worker protection legislation, including the **Workers' Compensation Law**, after amendment of the State Constitution. An earlier version of the law had been declared unconstitutional, ironically, just the day before the fire.⁵ In the wake

2. Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 RUTGERS L. REV. 657, 729 (1998).

3. As most readers are aware, on September 11, 2001, terrorists hijacked four jet airliners and crashed two of them into both towers of the World Trade Center in New York City, resulting in the death of thousands of people and massive destruction of the municipal infrastructure of that city. A third plane crashed into the Pentagon, also resulting in large scale loss of life and destruction. The fourth plane crashed into a field in Pennsylvania, apparently after the passengers overcame the hijackers, resulting in the deaths of all passengers.

4. See generally Paula Rosa, *The Triangle Shirtwaist Fire*, available at <http://www.historybuff.com/library/refshirtwaist.html> (last visited Mar. 27, 2007).

5. See generally The Kheel Center, Catherwood Library, ILR School at Cornell present *Triangle Factory Fire* (2005) (last visited Mar. 27, 2007) available at <http://www.ilr.cornell.edu/trianglefire/>; see also Paula Rosa, *The Triangle Shirtwaist Fire*, available at <http://www.historybuff.com/library/refshirtwaist.html> (last visited Mar. 27, 2007).

of September 11, 2001 attack, the federal government also enacted sweeping legislation, including the **September 11th Victims Compensation Fund**.⁶

Both of these statutes created administrative schemes discussed in more detail below. Both of these laws were enacted, at least in part, to allow victims to avoid expensive and time-consuming litigation in the judicial branch courts. Both have been, in my estimation, very successful at helping their intended beneficiaries and society.

No one would ever wish for a mass disaster to spur creation of any similar statutes. Nevertheless, the motivating force behind both of these laws was strong emotions which were widespread throughout society. I make this observation not to disparage these laws. I use the example of these two historical tragedies to illustrate a larger issue. It is my belief that strong emotion and passion can and should play a role in crystallizing public opinion and inspiring creative solutions to many social problems.

I. JUDICIAL BRANCH CONGESTION

By the term “judicial branch congestion,” I am referring to the delays inherent in most civil actions brought in state and federal courts in the United States. Though reliable statistics are difficult to come by, there is some evidence that the problem is worsening.⁷ Most civil cases take years to reach a resolution.⁸

And by resolution, I don’t mean that anyone necessarily gets a trial. As most people are aware, the vast majority of civil cases brought in state and federal courts are resolved by settlement, summary judgment, or dismissal and are never brought to trial.⁹

6. Wendy Floering, *The September 11th Victim Compensation Fund of 2001: A Better Alternative to Litigation?*, 22 J. NAALJ 195, 206 (2002).

7. James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 300 (2006).

8. Patrick E. Higginbotham, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury*, 12 TEX. WESLEYAN L. REV. 501, 503. (2006). Note that lengthy litigation is especially common for medical malpractice lawsuits, which average six years in New York State. Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693 (1994).

9. Peter A. Bell and Jeffrey J. O’Connell, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 115 (1997).

Less known is the fact that the number of civil trials has been in dramatic decline over the last 40 years.¹⁰

For example, in 1962, 11.5 % of federal civil cases were disposed of by trial. By 2002, only 1.8 % were.¹¹ Oddly, even as the number of federal court case filings has been on the increase, the number of trials has been steadily decreasing.¹² The state courts show similar trends in terms of increasing caseload and declining numbers of trials.¹³ So much for receiving your proverbial “day in court.” By way of illustration, it may amuse many administrative law judges to learn that the average federal district court judge in the year 2004 had only 19 trials (!)¹⁴

II. THE SOURCES OF JUDICIAL CONGESTION

An increase in population certainly plays some role in judicial congestion. When you consider that the population of the U.S. has increased by about 100 million people in just the last 39 years,¹⁵ a considerable increase in litigation can be expected. We can also be reasonably sure that, in most jurisdictions, the number of judges does not always keep pace with this population increase. Indeed, most caseloads have increased in the past decade.¹⁶

10. Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, 30 No. 2 LITIG. 1 (2004).

11. *Id.*

12. *Judge's Views on Vanishing Civil Trials*, 88 JUDICATURE 306 (2005).

13. *Id.*

14. Patrick E. Higginbotham, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury*, 12 TEX. WESLEYAN L. REV. 501, 503. (2006).

15. See U.S. Census Bureau Release (Oct. 12, 2006), available at <http://www.census.gov/Press-Release/www/releases/archives/population/007616.html>. “The U.S. Census Bureau today reported that the nation’s population will reach the historic milestone of 300 million on Oct. 17 at about 7:46 a.m. (EDT). This comes almost 39 years after the 200 million mark was reached on Nov. 20, 1967.” *Id.*

16. Richard Y. Schauffler, Robert C. LaFountain, Neal B. Kauder, & Shauna M. Strickland, *Examining the Work of State Courts, 2004: A National Perspective from the Court Statistics Project*, (The National Center for States’ Courts Statistics Project, 2005) at 15,16; summary available at http://www.ncsconline.org/D_Research/csp/2004_Files/EWFront%20_final_2.pdf.

There has also been an increase in certain types of litigation over the last 40 years. Civil rights legislation since the 1960's has expanded legal rights and causes of action to large portions of the population who were formerly denied access to the courts.¹⁷ These include statutes regarding employment, housing, voting, and other rights, and prohibiting discrimination based upon race, gender, age, religion or disability.

In addition, there have also been very large increases in mass tort cases, especially class action lawsuits, in the last few decades, though there is conflicting evidence on whether it has recently leveled off or not.¹⁸ Many of these cases are product liability cases, especially asbestos cases since the 1970's.¹⁹

These and other mass tort cases with multiple plaintiffs pose special challenges to traditional common law litigation.²⁰ For example, there is often an extended time period between distribution of a product, like asbestos, or a defective medical device, like the Dalkon Shield, and the actual onset of a disease or illness. Moreover, some toxins interact with environmental or other factors to create the health hazard.²¹ Furthermore, people have varying levels of susceptibility to certain diseases compared to others with the same exposure.²² These issues can create difficulties in establishing proof of causation and assigning liability under traditional common law rules.

Another potentially unsettling trend in litigation has been the increase in the number and growing power of artificial persons (also known as corporations) in the legal system.²³ In 1970, about 40% of

17. Leon Silverman, *Are we a Litigious Society? The So-called Litigation Explosion*, *The Record* Vol. 58 at 298, nn. 3-4 (2003). See also Refo, *supra* note 10.

18. R. Schauffler, R. LaFountain, N. Kauder, & S. Strickland, *supra* note 16, at 26.

19. Silverman, *supra* note 17, at 296, 300.

20. Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613 (2005).

21. *Id.* at 617.

22. Gary E. Marchant, *Genetic Data in Toxic Tort Litigation*, 14 J.L. & POL'Y 7 (2006).

23. *Dr. Frankenstein's Lawyers?* UB Law Forum Fall 2005 Vol. 18, No. 1, at 56 (2005).

civil cases in the federal courts involved a natural (or real) person suing a corporation. By 2005, the figure was 60%. The impact of this shift has still not been fully analyzed.

I acknowledge that, so far, my research into *specific* sources of judicial congestion has turned up often contradictory statistics.²⁴ I had hoped to identify a definite villain in the form of societal changes, an increase in a particular class of cases, or budget cuts in the judicial branch, but that has not materialized. A precise villain is difficult to pin down with rigorous empirical data.²⁵ Regardless of the source of congestion, it is important for us, as a society, to consider the second part of this equation, which is the impact of such congestion.

III. THE IMPACT OF JUDICIAL CONGESTION

Plainly, crowded judicial court dockets have an impact on the judges themselves. I am sure that many judicial branch judges and administrative law judges reading this article can describe, firsthand, the personal impact of an overloaded calendar. There are still only twenty-four hours in a day. Heavy calendars create job pressure and stress.

Beyond a certain point, an overload of cases can only have two possible results. Either there is a decline in the *quality* of rulings and decisions, or a decline in the *quantity* of rulings and decisions.

A decline in quality will eventually result in more appeals and reversals, and a decline in quantity will eventually result in an increase in the backlog of cases awaiting a hearing. Both result in delays for the waiting litigants.

I have no doubt that courtroom decorum is often a casualty of congestion as well. Likewise, the emotional and psychological stress on the judges themselves certainly takes its toll. However, of much greater concern for the purposes of this article is the impact of judicial congestion and delay on the *litigants who are awaiting relief*,

24. See generally Lawrence A. Salibra, *Debunking the Civil Justice Reform Myth: If No Litigation Crisis Exists, How Can We Fix It?*, 37 No. 3 JUDGES' J. 18 (1998).

25. *Id.*; see also: James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 296 (2006).

as well as the impact on *society's confidence* in the judicial branch of government.

With respect to litigants (or potential litigants), our interests should always focus on the most vulnerable members of society. I am just going to mention a few to consider: children in foster care awaiting adoption or child support orders, immigrants facing deportation, victims of identity theft, and persons suffering injury, illness, or other losses due to defective products, environmental toxins, medical malpractice, or natural disasters.

With respect to society's confidence in the judicial branch of government, this concept is a little more difficult to measure. Nevertheless, it is clear that court congestion and delays can erode confidence in the institution. When we stop believing that courts can deliver justice, then we, as a civil society, will be in very serious trouble. We need only to look around the world to failed states, such as Somalia, and civil wars, such as the one in Iraq, to observe what happens when there is no rule of law.

IV. SOME EXISTING ADMINISTRATIVE ALTERNATIVES²⁶

As I mentioned earlier, the **Worker's Compensation Law** is one of the premier examples in the United States of an administrative alternative to judicial delay. It is a legislative scheme that involved a compromise that limited an employer's liability and increased the employee's certainty of recovery.

The early 20th century was a time of rapid industrialization with rising rates of industrial injuries and deaths. Workplace deaths and injuries near the turn of the century had reached appalling levels.²⁷ When injured at work, a worker's only recourse was to bring a court action against his employer, which was an expensive and time-consuming undertaking with a slim possibility of success. There was a growing recognition by society that common law causes of action

26. Please note that the administrative programs discussed herein differ in kind from straight "entitlement" programs such as unemployment insurance or social security insurance programs which create statutory property rights for which there is no common law equivalent.

27. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 HARV. L. REV. 690, 694-95 (2001).

in courts of law were becoming increasingly inadequate to address the needs of these injured workers.²⁸ There was also a growing fear by government and business about the possible growth of radical political movements, inspired by this mounting crisis.²⁹

In New York State, the aforementioned Triangle Shirtwaist Company fire, which resulted in 146 deaths, was a defining moment in this history. In the aftermath of the fire, the factory owners were acquitted of any criminal wrongdoing.³⁰ Twenty-three families sued the two owners of the factory and after several years of litigation, eventually settled the suits for \$75.00 each.³¹

Nevertheless, this disaster was a critical event which galvanized public support for workers' compensation³² as well as other labor reforms and worker safety regulations.³³ It motivated the New York State government to move forward without further delay on this important legislation. In response to the tragedy and public reaction, the state legislature formed the New York State Factory Investigating Commission and empowered this Commission with broad investigative powers. Findings of this Commission lead to passage

28. Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 663, 704-05 (2005-06).

29. *Id.* at 706.

30. Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, (Symposium - After Disaster: The September 11th Compensation Fund and the Future of Civil Justice) 53 DEPAUL L. REV. 251, 262 (2003).

31. See The Kheel Center, Catherwood Library, ILR School at Cornell present *Triangle Factory Fire* (2005), available at <http://www.ilr.cornell.edu/trianglefire/> (last visited Mar. 27, 2007); see also Paula Rosa, *The Triangle Shirtwaist Fire*, available at <http://www.historybuff.com/library/refshirtwaist.html> (last visited Mar. 27, 2007); see also Photos from *The Triangle Factory Fire*, available at <http://teaching.arts.usyd.edu.au/history/hsty3080/3rdYr3080/trianglewebsite/> (last visited Mar. 27, 2007).

32. Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 729 (1998) (citing: McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 L. & SOC. INQUIRY 621, 641-48 (1995)).

33. Friedman & Thompson, *supra* note 30, at 257.

of thirty-six major labor reform measures.³⁴ Many other states passed similar legislation during this same time period.

Workers' Compensation Law (originally called "Workmen's Compensation Law") involved a new legal concept: *liability without fault*. This novel concept was made more palatable to industry by a negotiated trade-off of rights. To pursue a workers compensation claim, workers would not be required to establish the negligence of the employer. Employers were no longer permitted affirmative defenses, such as contributory negligence, assumption of risk, or that the injury was caused by fellow worker. In return, workers gave up their right to sue their employer in the courts for workplace accidents, with certain limited exceptions. In addition, workers could not seek any punitive damages or awards for pain and suffering and the awards themselves were carefully defined and limited by statute.

The benefits of this system included predictable, limited awards, elimination of uncertainty, and elimination of wasteful, time-consuming litigation. Many more workers were assured a recovery for a work accident than were assured under the tort litigation system.

The impact on the judicial branch was substantial, beginning with the immediate elimination of nearly all lawsuits against employers involving workplace accidents.³⁵ Moreover, in New York State, after administrative adjudication, very few Workers' Compensation Cases are appealed to the courts. The Appellate Division of the New York State Supreme Court, where judicial appeals of the Workers' Compensation Board must be filed, receives only about 100 cases per year, after exhaustion of administrative appeals.³⁶

Savings in terms of efficiency and costs are quite significant. It is estimated that the total administrative cost of the Workers' Compensation system consumes less than 25% of its total system

34. Eric G. Behrens, *The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation*, 62 TEX. L. REV. 361, 361, 363 (1983).

35. In New York State, some lawsuits against an employer involving work accidents are permitted, such as when an employer is uninsured in violation of the law, or when an employer has been impleaded when a third-party, such as a manufacturer, is sued by a claimant.

36. See 2005 N. Y. State Workers' Compensation Board Annual Report at p. 13, available at <http://www.wcb.state.ny.us/content/main/PressReleases.jsp>.

costs.³⁷ This is in stark contrast to the administrative cost of the traditional judicial tort system in the United States, which by some estimates, consumes as much as 58% of its total system costs, and requires approximately \$180 billion per year to function.³⁸

There are other benefits as well. Workers' Compensation also provides incentives for employers to promote safety because poor safety records result in increased insurance premiums. Some research suggests that, without workers' compensation, occupational fatalities would be 1/3 higher than they are now.³⁹

Though initially controversial, businesses and society came to accept this legislation and the cost of Workers' Compensation Insurance is now accepted as a "cost of production." Today, reversion to the old negligence tort system is almost unthinkable.⁴⁰

The statutory scheme of the **September 11th Victim Compensation Fund**,⁴¹ was prompted by the terrorist attack of September 11, 2001 and public reaction that followed.

Like Workers' Compensation, the September 11th Victim Compensation Fund (hereinafter, "Fund") also resulted in multiple benefits to the participants and society. In addition to providing compensation to the victims, the legislation was also intended to save the airline industry from bankruptcy and the U.S. economy from

37. Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1505 (2005).

38. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1560 (1987). See also Studert, et al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury?*, 60 -SPG LAW & CONTEMP. PROBS. 1, 30 (1997); see also Mathew C. Sullivan, *Tort Reform: Mississippi's Tort Reforms as Compared to Other Jurisdictions Abroad - A sensible Treatment Protocol for the U.S. Tort System Ills or Not?*, 19 TEMP. INT'L & COMP. L.J. 507, 508 (2005).

39. Andrew P. Morris & Susan E. Dudley, *Defining What to Regulate: Silica and the Problem of Regulatory Categorization*, 58 ADMIN. L. REV. 269, 284 (2006).

40. A. Bell & J. O'Connell, *Accidental Justice: The Dilemmas of Tort Law* at 207, 208 (1997); see also Lin, *supra* note 37, at 1509.

41. This Fund was part of the Air Transportation Safety and System Stabilization Act (ATSSSA), Pub. L. No. 107-42, 115 Stat. 237 (2001) (to be codified at 49 U.S.C. § 40,101).

collapse.⁴² Under the legislation, a monetary fund was created and the attorney general appointed a special master, Kenneth Feinberg, a respected attorney with considerable experience with giant class-action lawsuits. He had served as a special master in the Agent Orange, DES, and Dalkon Shield litigation.⁴³

Under the terms of this legislation, victims of the attack who filed claims under the Fund waived their right to sue in tort for compensatory and punitive damages.⁴⁴ They would be entitled to awards from the Fund without having to prove any negligence by any party. Those who did not wish to participate could bring lawsuits in court. However, jurisdiction for such lawsuits would be strictly limited to the U.S. District Court for the Southern District of New York, using the substantive law of the state where the respective crash occurred, and damage awards would be capped at insurance policy limits of the entities sued.

The Fund gave sweeping authority to the special master to create procedural and substantive rules, which were not subject to any appeals. He was unilaterally responsible for filling in many details of the program.⁴⁵ The Fund included some of the traditional elements of due process, including notice and the opportunity to be heard, the right to counsel, and the right to a determination by an impartial decision-maker. However, there was no appeal from the final rulings of the special master.⁴⁶ In light of the extraordinary powers afforded to the special master, and absence of any right to appeal his findings, in many ways, Feinberg did not resemble a typical administrative law judge whose decisions would be subject to administrative review.⁴⁷

The special master and the Department of Justice developed a methodology for calculating economic and non-economic losses of

42. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 137 (2005).

43. *Id.* at 148.

44. Grey, *supra* note 28, at 677.

45. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 2 (2006).

46. Ackerman, *supra* note 42, at 137, 228.

47. Berkowitz, *supra* note 45, at 22.

the victims.⁴⁸ Unlike Workers' Compensation, participation in the September 11th Fund was voluntary, though nearly all eligible parties did eventually choose to participate.⁴⁹

Although arguably imperfect, the Fund succeeded in sparing the families of victims and the country the ordeal of a prolonged process of tort litigation. In the course of its two years of operation, the September 11th Victim Compensation Fund awarded about \$7 billion in compensation to 5560 victims and their families and completed its work on June 15, 2004.⁵⁰

It is worth noting that several other countries, including Israel, Great Britain, Spain, and Italy, have adopted permanent compensation schemes for victims of terrorism.⁵¹

The September 11th attacks also spawned other anti-terror legislation and executive actions, which have created many new issues regarding the extent of due process rights of enemy combatants before Article II administrative or military judges. The final extent of those rights and the administrative remedies to which these prisoners are entitled is still in a state of flux as Congress and the President attempt to comply with the Supreme Court decision in *Hamden v. Rumsfeld*.⁵²

There are numerous other examples at the state and federal level, as well as internationally, of a wide variety of administrative schemes that permit resolution of issues which previously required court litigation. These examples range from modest to extremely comprehensive.

In the **State of Georgia**, legislation was enacted permitting a state agency, the Department of Human Resources, when seeking to establish paternity of a child, to adjudicate the issue of paternity in an administrative forum.⁵³ Under certain circumstances, the Office of State Administrative Hearings now has the authority to adjudicate the issue of paternity, and their administrative determinations have the same force and effect as a judicial decree. These rapid administrative

48. Ackerman, *supra* note 42, at 176.

49. *Id.* at 137.

50. *Id.* at 227.

51. Grey, *supra* note 28, at 710.

52. *Hamden v. Rumsfeld*, 126 S. Ct. 2749 (2006).

53. Ga. Code Ann. § 19-7-40 (2007). Jurisdiction; administrative determination of paternity.

rulings then permit the implementation of appropriate child support orders.⁵⁴

Legislation in **New York State** provides that prosecution of non-criminal moving traffic violations in certain cities be handled before an Administrative Law Judge at the Traffic Violations Bureau of the State Department of Motor Vehicles. Accordingly, these actions are taken out of the courts and processed before an ALJ with the authority to impose fines and revoke or suspend drivers licenses and auto registrations.⁵⁵

The **State of Virginia** and the **State of Florida** have attempted to establish administrative schemes for the explicit purpose of stabilizing the medical malpractice insurance market for obstetricians.⁵⁶

Both **Virginia's Birth-Related Compensation Program** and **Florida's Birth Related Neurological Injury Plan**, in exchange for limiting tort remedies, provide financial assistance to a class of tort plaintiffs consisting of families of babies who suffered severe brain injury during childbirth procedures. These no-fault systems are administered by legislatively-created organizations in which no-fault recovery is the exclusive remedy for injured parties, unless they are able to prove some manner of intentional wrongdoing. However, there are many voluntary elements to these programs, making them less than comprehensive.⁵⁷ For example, claimants unsuccessful on their no-fault claim are free to seek tort recovery, and claimants are not required to pursue the redress through the no-fault program before bringing a civil suit⁵⁸.

There is some evidence that these no-fault systems in Virginia and Florida have succeeded in their goal of stabilizing insurance premiums for certain types of physicians as well as reducing the

54. D. Ailen Dodd, *Child Support: Moms and Dads are Told to Work Out Agreements to Take Care of Kids – Without Getting the Judicial System Involved*, Atlanta Journal-Constitution, The (GA) June 5, 2006, at 1J.

55. See N.Y. State DMV, *What to Do if You Receive a Traffic Ticket*, available at <http://www.nydmv.state.ny.us/broch/c49.htm> (last visited 12/28/06).

56. Mathew Hitzhusen, *Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?*, 22 ARIZ. J. INT'L & COMP. L. 649, 687 (2005).

57. *Id.*

58. *Id.*

administrative costs of such actions,⁵⁹ though these conclusions have been questioned by some commentators.⁶⁰

I will mention just two other administrative schemes in the United States that were created by legislation.

First, the **Price-Anderson Act** was one of the earliest legislatively-created alternatives to the tort system implemented to address mass tort litigation. Under the Act, claimants are only required to prove that their injuries resulted from a nuclear power plant accident and all affirmative defenses are waived. It also imposes limits on the overall liability of nuclear plant licensees.⁶¹ It is a legislative attempt to devise a no-fault alternative to the tort system in the event of a nuclear accident,⁶² though it has been only infrequently invoked.⁶³ The Price-Anderson Act has been criticized as being too complex and unlikely to succeed at reducing costs or delays in the event of a major accident.⁶⁴

Second, the **National Childhood Vaccine Injury Act** is a no-fault compensation scheme intended to provide relief to children injured by exposure to government-mandated vaccinations. The development of case law regarding product liability in the 1950s and 1960s caused vaccine manufacturers to fear costly litigation. As a result, some manufacturers halted vaccine production, raising concerns of a vaccine shortage.

The National Childhood Vaccine Injury Act was designed to address this concern by simplifying recovery of damages by plaintiffs by allowing them to avoid the burdens of proof associated with traditional tort actions, while limiting the amount of that recovery.⁶⁵ Claims are decided by special masters appointed by federal judges.⁶⁶ Plaintiffs may then accept the decision of the special master or may

59. *Id.*

60. Sandy Martin, *Notes and Comments: Nica-Florida Birth-Related Neurological Injury Compensation Act: Four Reasons Why This Malpractice Reform Must Be Eliminated*, 26 NOVA L. REV. 609, 643-44 (2002).

61. Grey, *supra* note 28, at 695.

62. Floering, *supra* note 6, at 198.

63. Grey, *supra* note 28, at 697.

64. Floering, *supra* note 6, at 199.

65. Grey, *supra* note 28, at 699.

66. *Id.* at 702.

reject it and file a civil suit against the manufacturer in state or federal court.⁶⁷

This scheme, like many such administrative schemes, involves a trade-off of interests which limits the liability of the manufacturers, but simplifies the amount of evidence needed to obtain a recovery.⁶⁸

Other administrative schemes or funds have been created by court order, such as the **Tobacco Settlements**, **Agent Orange** cases, or the **Dalkon Shield Trust Fund**. These schemes involve trust funds set up and administered by a special master assigned by the court.⁶⁹ These, and similar court ordered settlements, usually permit individual claimants to opt out and take their chances in litigation.

V. SOME INTERNATIONAL EXAMPLES

Other countries have implemented quite comprehensive and ambitious programs to address the inadequacies of judicial remedies.

For instance, **Japan** has created a compensation program intended to address the costs of pollution.⁷⁰ This legislation was prompted by severe industrial pollution that accompanied the country's rapid economic growth and the increase of pollution-related diseases near some industrial facilities. Japanese society recognized that traditional tort negligence litigation was ineffective and inefficient, especially due to the difficulties in proving causation. The **1973 Pollution Related Health Damage Compensation Law** was financed mainly by taxes on certain polluting industries. Under this statute, claimants living in certain designated areas for a particular time period who develop specific diseases are entitled to disability benefits, medical expenses, and lost earnings. There is no award for property damage or for pain and suffering.⁷¹

Finally, one of the most interesting and comprehensive administrative programs I have encountered is the **New Zealand Accident Compensation Corporation (ACC)**, which covers almost any personal injury within the borders of New Zealand. The statute

67. *Id.* at 700.

68. Floering, *supra* note 6, at 199.

69. *Id.* at 197.

70. Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1494-96 (2005).

71. *Id.* at 1496.

provides that compensation from the ACC shall be the exclusive remedy for individuals seeking to recover damages for virtually any accidental personal injury.⁷² This comprehensive program includes injuries that happened at work, at home, due to a motor vehicle accident, injuries arising from criminal acts, and even injuries due to certain medical errors.⁷³ The law prohibits individuals from bringing proceedings independently of the statute for damages arising directly or indirectly out of personal injury covered by the Act. There are some very limited exceptions which allow certain tort actions in court.⁷⁴

The ACC allocates approximately \$1.4 billion annually towards rehabilitation, treatment, and weekly compensation for personal injury.⁷⁵ The program is funded by collecting premium payments from all citizens of New Zealand and a few other tax levies on registered health professionals and organizations that provide treatment under the Act.⁷⁶ In addition to monetary benefits, the extensive program provides coverage for rehabilitative measures to restore the claimant's "health, independence, and participation in society."⁷⁷ Remarkably, only about 10% of the ACC's funds are expended for administrative purposes.⁷⁸

VI. SOME PRINCIPLES AT WORK

My list of administrative programs which take disputes out of the courts is by no means exhaustive. Strictly speaking, I note that adoption of such programs is not always motivated *solely* to relieve judicial congestion or delays. Indeed, many programs modify the substantive laws involved in order to permit easier redress for those that society has identified as victims. In the absence of some of these administrative alternatives, many such victims would probably

72. Hitzhusen, *supra* note 56, at 663. See generally Accident Compensation Corporation, *Everyone in New Zealand Is Covered for Injuries*, available at <http://www.acc.co.nz> (last visited Mar. 27, 2007).

73. Hitzhusen, *supra* note 56, at 663-64.

74. *Id.* at 670.

75. *Id.* at 665.

76. *Id.*

77. *Id.* at 663.

78. Lin, *supra* note 70, at 1504.

never even seek redress through the judicial system, owing to the fact that their claims would not be viable in light of expected court delays, and other shortcomings of traditional common law tort rules.

Nevertheless, with the examples I have discussed, it is possible to identify some important principles at work.

Some of these programs have elements of “corrective justice,” based on the tort model, and some focus primarily on a “distributive justice,” based on the social welfare model.

Corrective justice refers to the concept that the wrongdoer should pay the victim for the loss. The usual corrective remedy is to compel the wrongdoer to provide compensation for the victim. In a sense, it looks to the past actions of the parties and assigns fault.⁷⁹

Distributive justice refers to the concept that all citizens in a society have an equal right to goods and opportunities and there is more concern with equitably distributing the burdens of accidents or injuries throughout society. A distributive remedy seeks to go beyond the one-time response of compensation to a specific victim and seeks to change the wrongdoer’s behavior in the future. In that sense, it looks to the future actions of the parties.⁸⁰

Most of the administrative programs discussed in this article contain elements of both corrective and distributive justice. It is also readily apparent that most of these administrative schemes include a “trade-off” of rights, which benefits both parties to the dispute and also often results in a net gain to society. That is, plaintiffs and defendants, as well as society, gain something of value.

These principles are important. Not only out of a general sense of fairness, but on a pragmatic level, these elements are important because they are necessary to obtain broad public support for such programs and because they will help such administrative schemes withstand constitutional scrutiny.

Indeed, when the constitutionality of the New York State Workers’ Compensation Law was challenged by employers as a “taking of property without due process,” the U.S. Supreme Court upheld the constitutionality of the law, in part, because of the

79. Chios Carmody, *WTO Obligations as Collective*, EUR. J. OF INT’L LAW, Apr. 2006, at 426.

80. *Id.*

reciprocity of the rights affected for both the employer and employee.⁸¹

Nevertheless, any administrative program or scheme that purports to take away or reduce liability should always be carefully evaluated before implementation. It is important to strike a careful balance between assignment of blame and ensuring adequate compensation to the largest number of victims.

VII. CAN THESE PRINCIPLES HELP US TO IDENTIFY OTHER DISPUTES WHICH MAY BE APPROPRIATE FOR TRANSFER TO ADMINISTRATIVE FORUMS IN THE FUTURE?

To answer this question, we, as a society, must again focus our attention on those classes of people who are being hurt by judicial delay, including those who are dissuaded from even pursuing judicial remedies due to shortcomings of traditional common law rules. This focus of attention should occur in our particular country, state, region, or county and, whenever possible, we must support administrative alternatives intended to assist them.

Some legislative schemes we can imagine will involve only a small number of local plaintiffs who meet limited particular criteria. Others may involve millions of plaintiffs nationwide. The important thing to remember is that such legislation can and should be drafted to suit the particular issues and problems at hand. One size does not fit all.

It goes without saying that asbestos and tobacco litigation are two obvious examples of mass tort litigation which might well benefit from an administrative solution. Both involve manufactured products which have resulted in injuries involving large numbers of claimants with difficulties in establishing proof of causation and assigning liability under traditional common law rules. However, many learned papers have already been written on those subjects and I intend to focus my comments on potential problem areas which are still on the horizon and have not been addressed at length. In terms of *classes of people* who will be hurt by judicial delays, I suggest the following three subject areas to watch closely in the future.

81. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1917).

First, I believe that rapidly increasing advances in technology and bio-technology will continue, but will be accompanied by increasing injuries and illnesses affecting large numbers of people. The fields of **nanotechnology**⁸² and **genetic engineering**, in particular, hold incredible promise for the future.

Nanotechnology, though it is still primarily in the research and development stage, refers to the manufacture or assembly of nanostructures into useful nanoscale devices. Nanostructures are extremely small structures with at least one dimension roughly between 1 and 100 nanometers (one-billionth of a meter). At this microscopic scale, many such devices or structures have unique physical or electrical properties which are potentially profoundly useful. For instance, certain nanotubes have tensile strength many times stronger than high-grade steel, yet are light and flexible.⁸³ Development of nanotechnology could also involve the creation of self-replicating devices.

It is anticipated that nanotechnology holds great promise for advances in such fields as electronics, medical tools and therapies, construction materials, personal care products, environmental cleanup, and energy production and conservation, to list just a few.⁸⁴ Moreover, the global market for nanomaterial products is projected to reach \$1 trillion within a decade.⁸⁵ With its potential for huge business profits, widespread consumer applications, combined with its microscopic composition and possible self-replication, the technology also raises the very real possibility of harmful consequences for human health and for the environment.⁸⁶ Because of the high potential for human or animal ingestion or absorption, some have referred to it as the “new asbestos.”⁸⁷

82. Michael A. Van Lente, *Building the New World of Nanotechnology*, 38 CASE W. RES. J. INT'L L. 173, 173-74 (2006).

83. Lindsay V. Dennis, *Nanotechnology: Unique Science Requires Unique Solutions*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 87 at 90, 91 (2006).

84. Karen Florini, et al, *Nanotechnology: Getting It Right the First Time*, 3 NANOTECHNOLOGY L. & BUS. 39, 39 (2006).

85. *Id.*

86. *Id.*

87. John Monica, et al, *Preparing for Future Health Litigation: The Application of Products Liability Law to Nanotechnology*, 3 NANOTECHNOLOGY L. & BUS. 54, 55 (2006).

With respect to genetic engineering, the field is vast and includes genetically modified organisms, genetically modified food, and cloning. Potential for harm from genetically modified foods are often unpredictable. For example, in 1999, it was discovered that people with Brazil nut allergies had allergic reactions to soybean seed into which a Brazil nut gene had been introduced (to increase the bean's protein level).⁸⁸ Genetically modified food in particular raises issues regarding human safety, as the long-term effects on humans is still an unknown.

Moreover, it is well known that non-native species of plants and animals, such as kudzu vine, gypsy moth, or Zebra mussel, can invade an environment and cause considerable harm. In light of the unintended and unpredictable harm caused by such non-natives species, it is clearly impossible to predict what vast environmental damage might potentially be caused by the introduction of "non-natural" species.⁸⁹

I believe that both emerging technologies of nanotechnology and biotechnology are extremely likely to bring with them environmental risks which could result in injuries and illnesses with long latency periods and difficult causation issues, involving multiple plaintiffs, all of which are problematic under traditional common law tort schemes.

Second, I believe that our rapidly increasing **reliance on computers and telecommunications technology** in our personal, business, and financial affairs will dramatically increase the risk of identity theft and other economic crimes.

As we have seen in just the past year, the theft or loss of even a single laptop computer can expose the personal data of millions of people. This has already occurred at state and federal government agencies. The U.S. Department of Veterans Affairs disclosed, in 2006, that it had lost data on 26.5 million veterans and their spouses plus 2.2 million active military members when a worker's computer was stolen out of his home. In New York State, the Special Fund Conservation Committee, a quasi-governmental agency, also reported a missing laptop in 2006, with potential exposure of personal data.

88. Barry S. Edwards, ". . . And on His Farm He Had a Geep": Patenting Transgenic Animals, 2 MINN. INTELL. PROP. REV. 89, 91 (2001).

89. *Id.* at 108-09.

The laptop was later recovered. There is growing evidence that this type of problem is widespread among U.S. companies.⁹⁰ Indeed, in 2006, I personally received a letter from a local hospital advising me of their missing laptop and the potential exposure of my personal, financial, and medical data.

Moreover, in addition to negligent release of information, it is impossible to underestimate the damage that a single disgruntled employee can willfully accomplish.⁹¹ This is to say nothing of the risk posed by a committed terrorist.

In the case of identity theft, winning damages, especially against the entities that lost or released the information, can be difficult in the courts,⁹² as such cases raise complex causation issues under traditional tort rules.⁹³

Third, I believe that global warming, or climate change caused by human activities, (which is real, by the way),⁹⁴ is likely to result in continued unforeseen weather patterns and regional weather

90. See Linda Rosencrance, *Survey 81% of U.S. Firms Lost Laptops with Sensitive Data in Past Year*, available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9002493> August 16, 2006 (Computerworld) (last visited Mar. 27, 2007).

[A]ccording to a survey released yesterday by Ponemon Institute LLC and Vontu Inc., a San Francisco-based provider of data loss prevention products. ...Eighty-one percent of companies surveyed reported the loss of one or more laptops containing sensitive information during the past 12 months, according to the survey, which queried nearly 500 information security professionals.

Id.

91. Donald Smothers, *U.S. Says Ex-Worker at Drug Giant Was Out to Damage Computer Data*, N.Y. Times, Dec. 19, 2006, at B1. In December 2006, a former systems administrator for the nation's largest pharmacy benefits manager was indicted of by a federal grand jury on fraud charges, which included the accusation that he had installed "logic bomb" on company computers, that, if activated, would have erased prescription information for 60 million Americans. *Id.*

92. Jason Krause, *Stolen Lives: Victims of Identity Theft Start Looking for Damages from Companies That Held Their Personal Financial Information*, A.B.A. J., Mar. 2006 at 36. See generally, Jason Krause, *Id Theft Is Real, but Winning Damages Is Illusive : Courts Reject Suits Seeking 'Justice for All' Through Class Actions*, 5 No. 44 ABA J. E-REPORT, November 3, 2006.

93. Krause, *supra* note 92, at 41.

94. See generally, A. Gore, *An Inconvenient Truth: The Planetary Emergency of Global Warming and What We Can Do About It* (Paramount Home Video 2006).

related disasters, similar to Hurricane Katrina in New Orleans in 2005.

Hurricane Katrina struck New Orleans, Louisiana on August 28, 2005, causing unprecedented death, injury, and devastation in that city and several neighboring states. The shocking images on television and the disparate impact on the city's poor and minority population⁹⁵ resulted in a large public outcry about the government's poor response to the disaster. The Congressional Black Caucus introduced a bill in the House of Representatives proposing a victims' compensation fund to aid the victims of Hurricane Katrina, similar to the September 11th Fund. The measure, entitled the Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005 would "provide for the recovery, reclamation, restoration and reconstruction of lives and communities and for the reunion of families devastated by Hurricane Katrina and to address the issues of poverty exposed by Hurricane Katrina."⁹⁶ At the time this article is written, the bill had received only limited support and was still pending in a subcommittee.

In 2002, the residents of Shishmaref, an Inuit hamlet on one of Alaska's barrier islands, voted to move off their island, which has become uninhabitable due to climate change.⁹⁷

Global warming, and the climate changes associated with it, can potentially result in major disruptions to our social and economic structures. This is likely to result in lawsuits seeking more aggressive governmental regulation of industries and activities that contribute to emissions as well as more lawsuits against industries or manufacturers who contribute to greenhouse gas emission. Increased litigation on these fronts can be anticipated both domestically and internationally. Entire areas, especially coastal cities, may be rendered unsafe for human occupation, raising numerous legal issues

95. Sherrie Armstrong Tomlinson, Note, *No New Orleans Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153, 1163 (2006).

96. Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005 H.R. 419, 109th Cong. (2005). Status of H.R. 4197 may be ascertained at the Library of Congress website, available at <http://thomas.loc.gov/> (last visited Mar. 27, 2007).

97. Kristen Choo, *Feeling the Heat: The Growing Debate Over Climate Change Takes on Legal Overtones*, 92-JUL. A.B.A. J. 29 (2006).

for the inhabitants who are forced to re-locate. This global phenomena is likely to generate countless human injuries and economic losses as well as extraordinary regulatory, jurisdictional, and liability issues in the legal arena.

All three of the aforementioned subject areas: nano/genetic engineering, over-reliance on information technology, and global warming, are likely to fuel increased litigation in the future. Such litigation will potentially involve large groups of plaintiffs vulnerable to judicial delays and share difficult causation and liability problems under traditional common law tort rules. It is my belief that carefully crafted administrative alternatives in these areas could help to provide fair and rapid relief to the victims.

VIII. THE BEST WAY TO IMPLEMENT SUCH CHANGES

I favor legislative solutions, rather than court-created funds because I believe that the legislature is in a better position to create a scheme that will not only help the litigants, but which will also benefit society as a whole.

Programs with strong administrators have certain advantages in terms of speed and efficiency. Certainly, in the case of the September 11th Fund, Feinberg can take considerable credit for helping make that program a success.⁹⁸ However, although administrative programs with a strong special master can have some advantages in terms of speed and efficiency, they can also be terribly dependent upon the quality of that individual appointed. Accordingly, I believe that Legislation that relies heavily upon strong administrators should be used sparingly. Administrative schemes with well-written procedural due process safeguards are likely to be more reliable in the long-run and less dependent on the personality of an administrator.

Programs that contain carefully crafted procedures or processes that are perceived as “fair,” in terms of an opportunity for all parties to be heard and in terms of clearly defined procedures and policies are more likely to result in outcomes that perceived as just by society as a whole.

98. Floering, *supra* note 6, at 221.

It is important to remember that well-crafted legislation is essential. And that legislation, once passed, must be constantly revised, adjusted, and updated to address problems as they arise. Poorly crafted legislation can actually increase judicial congestion.

An unfortunate example involves some recent revisions of immigration hearing procedures before the Board of Immigration Appeals (BIA).⁹⁹ In 1999 and again in 2002, the Justice Department adopted streamlining rules intended to accelerate processing of asylum cases. At the BIA, the reduction of the number of board members and the enactment of strict deadlines and other restrictions on appeals, in an effort to reduce the backlog, resulted in *pro forma* affirmances of numerous immigration judge decisions. This pattern of affirmances at the appeal level, with little or no written explanations, resulted in a dramatic increase in the number of filings appealing these decisions to the Federal Circuit Courts, alleging lack of due process. Between 2001 and 2004, it has been estimated that the Second Circuit saw BIA appeals jump an amazing 1448%.¹⁰⁰ Finding merit in a large number of these appeals, the courts have returned many cases to the Justice Department for revision or further proceedings, resulting in even further delays for waiting litigants.

Progress will not be easy. As Machiavelli stated nearly 400 years ago,

It must be considered that there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order.¹⁰¹

99. See Nina Bernstein,, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at 1; see also Richard Acello, *Asylum Logjam: Streamlined Immigration Cases are Flooding Federal Appeals*, A.B.A. J., Oct. 2005 at 18.

¹⁰⁰ Richard Acello, *Asylum Logjam: Streamlined Immigration Cases are Flooding Federal Appeals*, A.B.A. J., Oct. 2005 at 19.

101. Hitzhusen, *supra* note 56, at 649 (citing Niccolo Machavelli, *The Prince and the Discourses 21* (E.R.P. Vincent ed., Luigi Ricci trans., Modern Library 1950) (1513)).

However, as former Supreme Court Justice Louis Brandeis stated; “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁰²

Georgia, Virginia, Florida, and many other states have taken steps in this direction, by fashioning administrative alternatives to address their own particular problems and areas of concern. We can all encourage our own states to experiment in the same manner, whenever the opportunity presents itself. Such efforts may not always succeed.¹⁰³ Nevertheless, each state can, and should, identify its own particular problem areas; areas where the existing judicial system is falling short. After so doing, each state should then consider creating administrative alternatives that provide prompt and efficient remedies to victims.

Additionally, we should also not be afraid of big ideas and comprehensive statutory programs to address the big problems of our society. Just look to the example of New Zealand for inspiration. To consider just how far we can go, I also highly recommend a fascinating article in the Spring 2000 issue of the Journal of the NAALJ entitled “ALJs in 2050” by Professor James O’Reilly, which imagines the transfer of all tort litigation in the US into an administrative program overseen by administrative law judges in a new federal agency, thereby reaping remarkable benefits of efficiency and fairness.¹⁰⁴

That said, as this article is directed to the administrative judiciary, what else can we, as administrative adjudicators, do? We must constantly strive for excellence on a daily basis. Regular and frequent educational programs for all administrative judges, including attending conferences offered by NAALJ and other

102. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

103. I note that a Minnesota statute somewhat similar to Georgia’s, which gave powers involving child support orders to Minnesota ALJs, was later declared unconstitutional by the Minnesota Supreme Court. Krause, *Bench & Bar of Minnesota* Vol.63, No. 2 (February 2006), (citing *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999)).

104. James O’Reilly, *ALJs in 2050: Consequences of Merging Tort and Administrative Remedies*, 20 J. NAALJ 137 (2000).

professional organizations, are crucial in order to continually maintain, as well as to improve, our work product and procedures. With respect to any judges who are in a position at your agencies to influence support for such programs, I urge you to put your support behind them.

By our example and work product, we daily demonstrate the fairness and efficiency of administrative adjudication. The public and our legislators will be more inclined to look to the administrative model if they see it working with excellence on a daily basis.

IX. CONCLUSION

I began this article with a tale of two tragedies. I remind you again that emotions and passion do matter. Remember that these tragedies inspired our society and government to awake from their inertia and to implement major administrative programs that were extremely successful at both circumventing judicial delays, achieving fair and just remedies for those suffering, and providing very real benefits to society as a whole.

These examples, and the others I have discussed, remind us that the vast power of administrative law can, and should, be used to help the weakest and most vulnerable members of our society. I believe that our success in this endeavor will reflect on the type of society we wish to become.