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## The Conditions of Discretion: Autonomy, Community, Bureaucracy

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THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY. By *Joel F. Handler*. New York: Russell Sage Foundation. 1986. Pp. xi, 327. \$27.50.

There have been profound changes in our legal culture over the past several decades. One of the most important developments has been the proliferation of statutory entitlements and due process remedies.<sup>1</sup> However, Joel F. Handler<sup>2</sup> argues that the American system of rights and procedural remedies has not worked, and that "despite the impressive changes in our legal culture, justice remains largely unavailable to large sections of the population" (p. 2).

Handler is concerned with justice in administrative decisionmaking. He argues that in certain contexts administrative decisionmaking necessarily involves a great deal of uncertainty, both in the factual determinations made and the legal standards applied. In such situations, the adversary system of procedural due process is inadequate because it fails to appreciate the uncertainty inherent in the decision and tends to cut off much needed communication between the client and the agency.

In *Critique*, the first part of Handler's book, he focuses upon the interaction between a large-scale public agency and an individual, where the decisions to be made are largely discretionary, *i.e.*, not subject to solution by rule. Handler argues that such decisions require a system based on communication and cooperation (p. 7). In the second part, *Construction*, Handler proposes such a system, using the special education program of the Madison, Wisconsin School District as a model (p. 9). He uses special education as his primary example because it involves relationships between individuals and agencies which

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1. P. 1. As Handler notes, Professor Charles A. Reich referred to these entitlements and remedies as "The New Property." Handler summarizes Reich's argument that "[i]n the modern social welfare state, relations with government in regard to welfare, education, health, and so forth, involve new forms of property, and government ought to be held to the same standards of law as with conventional or traditional property." P. 1. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

2. Professor of Law, U.C.L.A. School of Law. A.B. 1954, Princeton University; J.D. 1957, Harvard Law School. Professor Handler's recent works include: POOR CLIENTS WITHOUT LAWYERS: WHAT CAN BE DONE? (1985) (edited with Louise Trubek); and LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE (1983) (with Michael Sosin).

are characterized by high amounts of discretion and continuity (pp. 2-3).

Handler's criticism of the adversary system of due process is reasonable and convincing. At its best, the system is flawed by maldistributions of resources and by its dependence upon the relative knowledge and experience of the participants. These problems are exacerbated by the ambiguity and uncertainty inherent in discretionary decisionmaking. Handler purports to address these weaknesses with his alternative system of justice. However, his system also has its weaknesses, some of which Handler fails to recognize.

In *Critique*, Handler argues that administrative justice requires the sharing of power: the individual and the official must reach a mutual agreement on important decisions affecting the individual (p. 4). In fact, Handler's concept of justice is analogous to informed consent (as it exists in theory, rather than in its flawed application to medical decisionmaking). Informed consent is itself based upon two ideas: individuality and social relationships (pp. 4-5). Handler argues that the adversary system fails to resolve the tension between these two ideas. He views the adversary system of due process as the embodiment of liberal legalism, the objective of which is the protection of the rights of the individual. However, Handler asserts that the system fails to respond adequately to the role and responsibilities of the individual as a member of society (pp. 4-5).

In discussing the flaws of the adversary system and the general weaknesses of liberalism, Handler notes with some approval the work of dignitary theorists.<sup>3</sup> According to dignitary theory, justice requires that certain dignitary values be maintained in procedural due process remedies. In other words, the effects of the process upon the participants, rather than just the outcome must be considered. Although Handler apparently draws upon this concept to some extent in developing his alternative approach, he asserts that dignitary theorists also ultimately fail to resolve the conflicts between the individual and society (p. 129).

Despite the weaknesses of liberalism, and the flaws of the adversary system, as Handler acknowledges, the system does work well in deciding factual questions and enforcing legal norms or claims of right. The system "contemplates a definitive decision that either ends the controversy or alters it significantly" (pp. 43-44). Thus, the adversary system is an effective means of establishing liability, assessing damages, and determining criminal liability.

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3. Pp. 124-29. Handler asserts that the "most thoughtful work so far dealing with dignitary values" is by Professor Jerry L. Mashaw. Handler states that the "'unifying thread' among the dignitary theorists [is] a perception that the 'effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking.'" P. 125 (quoting Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981)).

However, special education decisions present the worst possible conditions for the functioning of the adversary system. The substantive questions for each case are: (1) what is the nature of the problem with the child; and (2) what should be done about the problem? The answers to these questions are fraught with ambiguity and uncertainty. The legal standard is also indeterminate. A handicapped child has a right to an "appropriate education."<sup>4</sup> Given the ambiguity and uncertainty as to the causes of and proper responses to poor academic performance, the decision as to what constitutes an "appropriate education" necessarily involves the exercise of discretion. Handler argues that where the relations between the citizen and the state are discretionary and continuous, as in special education, the adversary system often "exacerbates rather than settles" disputes and tends to cut off ongoing communication (p. 44).

The system's failure is due, in part, to the reluctance of officials to allow participation and, in part, to their ability to thwart the intent of the law.<sup>5</sup> In special education, a due process hearing is seen as a challenge to the decisionmaker. Parents who seek hearings are viewed as malcontents or troublemakers. Furthermore, even if school officials make a good faith effort to encourage parental participation, the system depends upon the ability of the parents to take advantage of procedural remedies (pp. 62-63). The likelihood that parents will be able to overcome the system's barriers and to be "rights bearing" citizens is extremely low.<sup>6</sup>

Handler argues that the adversary system fails to appreciate both the social context within which decisions are made and how that context fatally undermines the procedure (p. 43). The system assumes that parties have adequate resources and that the judge is independent, contemplative, and deliberative. In fact, individuals often lack the knowledge and resources necessary to avail themselves of the procedural remedies. Furthermore, administrative hearing procedures are actually parts of larger bureaucratic systems, within which the hear-

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4. P. 44. See The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified in scattered sections of 20 U.S.C.) [hereinafter P.L. 94-142].

5. Extensive procedural remedies are provided by P.L. 94-142. Informed parental consent and participation is required throughout the process. Pp. 60-61. However, research indicates that, although P.L. 94-142 seems to have resulted in more parental contact with school authorities, there has not been much change in parental involvement in the actual decisionmaking process. The most important decisions are typically made by school personnel prior to the required "participation and consultation" with parents. In large school districts, committees spend an average of only 2.5 minutes per decision. Pp. 66-69.

6. Handler notes that in order for the due process system to work, the following conditions must be present:

[C]lients have to be aware that an injury has occurred; they have to think that the agency is at fault; they have to be aware of the existence of a remedy; they have to have the resources with which to pursue that remedy; and finally, they have to make a calculation that the benefits of pursuing the remedy outweigh its costs.

P. 22.

ings are only incidental. Consequently, agencies will attempt to alter the due process model to fit their institutional goals (pp. 34-36).

Handler does not advocate the complete abandonment of the adversary system of due process. He recognizes that, despite its faults, it may still be useful in particular situations when more informal procedures have failed. However, he believes that formal adversary proceedings should recede in importance and no longer dominate the relationship between the agency and the client (p. 20).

In *Construction*, Handler proposes, as an alternative to the adversary system of procedural due process, an approach which takes account of context and fosters cooperation and increased communication between agency and client. Handler bases his approach upon his observations of the special education program of the Madison, Wisconsin School District. As Handler describes that program, parents are viewed by the school district as part of the solution, rather than as the problem. Flexibility is maintained in performing evaluations and developing programs. Additionally, the system requires communicative conflict. In other words, parents communicate and cooperate with school officials while maintaining their autonomy and without sacrificing their own interests (p. 9).

Handler observes that the Madison system has been very successful. He attributes its success to four basic factors, represented by his "conditions of discretion," which are the embodiment of his alternative approach. He explains, "[b]y conditions of discretion, I mean justice, the sharing of power, in the context of the discretionary decision" (p. 160). Handler's four conditions of discretion are actually descriptions of environmental and systemic factors requisite to the facilitation and effective use of discretionary decisionmaking. Although phrased in terms of their application to a special education program, they are not limited to the special education context.

The first condition requires organizational change within the bureaucracy. The bureaucracy must want the participation of clients in deciding substantive issues. Handler's approach cannot succeed without the cooperation of the bureaucracy (p. 12).

The second condition requires a decentralized system. Handler argues that the Weberian model does not describe reality. "Organizations are not hierarchical, formalized, rational, efficient collectivities; rather, they are loose collections of multiple centers of power, shifting coalitions, adapting and readapting to environmental influences" (p. 195). Handler asserts that the "loosely coupled open system" is the appropriate form of organization to accomplish the goals of justice in the context of the discretionary decision (p. 195). Handler's goal is to strengthen the exercise of discretion, but in ways that preserve and enhance the protection of individual rights in the relationship between the client and the agency (p. 195).

The third condition, the activity of social movement groups, is essential to changing the environmental influences upon the organization at both the societal and local levels. Social movement groups are independent organizations that have two primary and potentially conflicting functions. Under Handler's system, these organizations participate in the formation of policy and the implementation process. However, at the same time, they represent individuals in their relations with the agency. For example, in the Madison School District such groups provide advocates to represent parents and to aid them in understanding and in working with the special education program. Social movement groups are required to create demands for change and to work for organizational and institutional support (pp. 217-18).

The fourth condition is social autonomy. Handler describes this condition in terms of Kant's categorical imperative: each person is to be treated as an end, never as a means.<sup>7</sup> However, Handler argues that the classic concepts of individualism are incomplete. Handler states, "I begin not with the independent, free-standing person, but rather with a person in a social relationship. The concern is not with the conditions of independence but with the conditions of *interdependence*" (p. 265; emphasis in original).

Handler's criticisms of the adversary system of procedural due process are valid and timely. The adversary system is certainly imperfect. But Handler goes beyond the familiar complaints, such as the maldistribution of resources and the excessive costs of litigation. He argues that the system is structurally unsound in the context of administrative decisionmaking, as it fails to consider the individual as a member of society. Handler purports to remedy these weaknesses with his alternative system of justice. However, Handler's system has its own weaknesses.

Handler recognizes several problems with his approach. The most paradoxical problem is that the system's own success may ultimately undermine its performance. Handler's system relies on informed consent: parties must reach a mutual agreement on important decisions. However, as school officials disclose more information and increasingly encourage parental participation, parents may come to trust the school officials and to rely upon their opinions, thus effectively defeating the goals of the system. Furthermore, as the organization acquires a reputation for success, it may be perceived as unacceptable within the community to question its decisions (pp. 108-09).

Additionally, the threat of cooptation is a primary risk running throughout the system (pp. 243-44). Assuming that the bureaucracy

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7. P. 123. See also p. 264 ("To treat a person merely as a means involves a violation of autonomy, because the person is then being treated in accordance with a rule not of his own choosing") (citing T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (1983)).

wants the participation of the social movement groups, it is easy to foresee an overzealous bureaucracy actually capturing the groups in its desire to accommodate them. Furthermore, if the bureaucracy does not want the participation of the social movement groups, cooptation is an obvious means of circumventing the system.

Handler also recognizes that additional problems are raised specifically by the use of social movement groups. First, interest group representation is suspect in democratic theory because the group represents special interests rather than the general interest. However, Handler reconciles the activities of social movement groups with democratic theory by requiring that the criteria of interest representation be embedded in the substantive standards of the policy (pp. 256-57).

A second problem is that as a result of the discretion involved in decisionmaking, public policy is necessarily contingent, *i.e.*, not subject to strict control or prediction. Handler asserts that, within special education, contingency is both inevitable and desirable. Nevertheless, discretion should be maintained within certain parameters (p. 257). Handler argues that the requirement of including interest representation in the substantive standards of the policy will also meet objections as to the contingency of public policy.

The third problem raised by the use of social movement groups is that such groups "may suppress dissent; they may coopt or capture rather than represent." This must be avoided. Handler argues that in this case the end of group behavior is autonomy, not cooperation. The basic goal is "to enhance the individual bargaining position" of each parent (p. 258).

In addition to the problems recognized by Handler, his approach also suffers from other weaknesses that he fails to address. For instance, his system is completely dependent upon the bureaucracy's understanding and support. Handler asserts that parental participation will yield "better results" for the agency. This promise of increased success is to serve as an incentive for the agency to maintain the required degree of communicative conflict and to ensure the autonomy of the social movement group. However, Handler fails to define "better results" and to give empirical support for the proposition that parental participation actually will yield such results. As the bureaucracy now effectively disregards the law's requirements that there be parental participation and informed consent, it is reasonable to question whether the bureaucracy actually believes that such action will lead to better results (at least as it defines them).

Even if this proposition can be adequately supported to convince the bureaucracy, there are other factors which may undermine Handler's approach. In times of deficit spending and demands for greater fiscal accountability, it will be increasingly difficult to maintain decentralization and to tolerate otherwise desirable uncertainty. Addition-

ally, Handler rejects the Weberian model as not descriptive of reality, but does not adequately address the concerns of natural systems theorists.<sup>8</sup> Bureaucrats intent on ensuring their own survival are not likely to be enthusiastic about sharing decisionmaking power and accepting uncertainty as an inevitable and desirable part of the system. In fact, it is questionable to what extent the bureaucracy is motivated by the desire to achieve "better results" at all.

Furthermore, given the emphasis on the organizational incentive of improved results, it is unclear what importance dignitary values ultimately serve in Handler's system. The bureaucracy apparently heeds such concerns only to encourage parents to participate. Dignitary values are thus used as means and are not "ends in themselves, goals without regard to substantive outcomes," as dignitary theorists insist they should be (p. 148).

Handler also fails to address adequately the problems of cooptation. The risk of cooptation runs throughout his system, especially in Handler's reconciliation of the role of social movement groups with democratic theory. Interest groups are required to adhere to criteria specified in the policy. It is questionable whether government could monitor such adherence or whether deviation could be corrected without cooptation by the bureaucracy.

As Handler acknowledges, his approach is based upon a very optimistic view of humanity, "a conception of people who are capable of altruism and individuality, trust and autonomy, respect, responsibility, and morality" (p. 300). It is doubtful that this is an accurate description of the administrative state. Furthermore, his approach is dependent upon the bureaucracy and social movement groups maintaining an ideal level of both cooperation and conflict. Too much of either would result in failure. Given the conflicting demands upon both entities and the underlying inequality in their bargaining positions, it is unlikely that such a tenuous relationship could be achieved and maintained.

Furthermore, there are great risks involved. Despite the flaws of the adversary system, many people have won important substantive rights. Such gains were the result of the aggressive use of a formal adversary system, based upon the protection of individual rights. Although the system is not as effective as it should be in addressing the needs of lower economic classes, it does provide at least some identifiable limitation upon the actions of the bureaucracy. It is possible that informalism will inevitably lead to increased domination of the lower economic classes.

Handler's response to this threat is to reserve the adversary system

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8. Natural systems theorists view organizations in terms of "self-maintaining systems, whose one overriding goal is survival as an end in itself rather than achieving agreed upon goals." P. 200.



for those situations in which it is most needed. However, this merely distances individuals from their rights and increases the obstacles they must overcome to be "rights bearing" citizens. Although improvement in substantive decisionmaking is certainly desirable, sweeping change in the procedures and protections defining the relationships between agencies and clients should be approached with caution.

Handler addresses an important and serious flaw in our system of administrative justice. His book is worth reading for its discussion of the issues and its summary of the various theories proposed. However, while his approach offers valuable insight into the weaknesses of the adversarial system, it is not without weaknesses of its own.

— *Steven F. Cherry*