Michigan Law Review

Volume 82 | Issue 4

1984

From Discretionary to Bureaucratic Justice

Barry Boyer
State University of New York at Buffalo School of Law

FROM DISCRETIONARY TO BUREAUCRATIC JUSTICE

*Barry Boyer**

BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS. By *Jerry L. Mashaw*. New Haven and London: Yale University Press. 1983. Pp. x, 238. $25.

Bureaucratic Justice is a quietly subversive book that challenges the legal profession's conventional wisdom on several levels. At a time when commentators of all political persuasions dismiss bureaucratic expertise as a myth and despair of the possibility of neutral administration, Professor Mashaw assures us that rational, benevolent expertise is alive and well and living in the Social Security Administration (SSA). This expertise, he argues, produces mass justice that is neither inferior nor subordinate to the brand of justice dispensed by the courts. Rather, SSA can serve as a model for other bureaucracies — if only the courts and lawyers can refrain from their clumsy tinkering with the system.

Readers who have followed Professor Mashaw's earlier writings on the Social Security system, such as *How Much of What Quality*[1] and *The Management Side of Due Process*,[2] will find much that is familiar in *Bureaucratic Justice*. In this book, however, Mashaw's numerous valuable insights into the functioning of the massive SSA bureaucracy have been synthesized and generalized into a unified vision of justice in the modern regulatory state.

The heart of this vision consists of three conceptual models of administrative justice which are "distinct" and "highly competitive" (p. 23). The first model, and the one most fully developed in the SSA, is Bureaucratic Rationality. This form of justice seeks to guarantee that individual bureaucratic decisions will be "accurate and efficient concrete realizations of the legislative will" (p. 25). In the SSA, Bureaucratic Rationality frequently comes into conflict with a second model of justice, Professional Treatment, which is associated

* Professor & Director of the Baldy Center for Law & Social Policy, State University of New York at Buffalo School of Law. Coauthor (with Ernest Gellhorn), Administrative Law and Process in a Nutshell (2d ed. 1981). A.B. 1966, Duke; J.D. 1969, Michigan. — Ed.

1. Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823 (1980).

2. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

primarily with the doctors and vocational rehabilitation specialists who are involved in disability determinations. These helping professions understand the goal of justice to be assuring that decisions "provide appropriate support or therapy from the perspective of relevant professional cultures" (p. 25). Both the Bureaucratic Rationality and the Professional Treatment models may, in turn, conflict with the Moral Judgment model of justice favored by the legal profession. The overriding objective of this ideal of justice is to assure that decisions are "fairly arrived at when assessed in the light of traditional processes for determining individual entitlements" (p. 25) — a goal that echoes some of the rhetoric of the procedural due process cases.[3]

In assessing the traditional legal view of administrative justice, Mashaw is careful to distinguish between "external" administrative law — that which is codified in statutes like the Administrative Procedure Act[4] or is imposed on the agency by reviewing courts — and the "internal" administrative law that results from the influence of legally trained insiders like the administrative law judges who decide disability appeals. Mashaw has nothing but contempt for external administrative law, dismissing it as a "history of failed ideas" that "oscillate[s] continuously between irrelevance and impertinence" (p. 1). The external legal system proceeds from an inadequate understanding of the phenomena it seeks to control, uses an inappropriate array of techniques to alter bureaucratic behavior, and examines only a small, unrepresentative sample of the relevant agency decisions. Even the landmark judicial review decisions are fatally flawed. Thus, in *Goldberg v. Kelly*[5] the Supreme Court "misunderstood what caused decisional errors and vastly overestimated the capacity of welfare bureaucracies to run a hearing system" (p. 4), and *Overton Park*[6] was based upon "an atrociously simpleminded interpretation" of the relevant statutes (p. 4, footnotes omitted). While these incompetencies of the courts are rehearsed at some length, Mashaw makes clear that any outside entity attempting to control the details of administration in a vast bureaucracy like SSA will be comparably impotent. For better or worse, "the task of improving the quality of administrative justice is one that must be carried forward primarily by administrators. The task is too complex for the nonexpert, too time and resource consuming for outside institutions with competing interests" (p. 15). The fundamental question, then, is how a bureaucracy like SSA , largely insulated from effective oversight, will reconcile the competing models of justice within itself.

3. *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

4. 5 U.S.C. §§ 551-706, 1305, 3105, 3344, 7521 (1976).

5. 397 U.S. 254 (1970).

6. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

The bulk of *Bureaucratic Justice* is devoted to answering that question by tracing through the conflicting values and bureaucratic imperatives surrounding disability decisions. This analysis, which manages to be both conceptually sophisticated and empirically convincing, resists easy summary; the tone of it is captured by one of Mashaw's subtitles, "Searching for the Good Within the Constraints of the Possible" (p. 47). In the end, SSA's "tilt" toward bureaucratic rationality, and its heroic attempts to impose hierarchical controls despite "the intractability of diverse human materials" (p. 167), earn high marks on the scale of justice. To be sure, Mashaw offers several suggestions for improving the system, but these are modest incremental proposals, such as providing face-to-face contact between bureaucrats and clients (pp. 198-99) or establishing a corps of lay advocates to represent claimants (pp. 200-02). On the whole, "SSA has succeeded remarkably well in embracing both the neutrality, expertise, and efficiency that are the promise of bureaucracy and the concern for individual circumstances and well-being that is promised by [models of justice based on] moral entitlements and professional treatment" (p. 214).

A curious omission in *Bureaucratic Justice* is Mashaw's failure to mention the book that has been most influential in shaping contemporary legal thought on the problem of mass justice in the welfare state: Kenneth Culp Davis's *Discretionary Justice*.[7] A brief comparison of the premises underlying these two books illustrates some of the changes in thinking about law and bureaucracy during the past fifteen years and also highlights the problems of defending the legitimacy of the regulatory state.

Davis's well-known view that administrative discretion often undermines fair administration and should be more strictly controlled was based upon a straightforward definition of justice. "The central question about justice is this," wrote Davis: "If A and B are equally deserving of prosecution, or if A is more deserving of prosecution than B, is a decision to prosecute B but not A unjust?"[8] Even in the

7. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969). In general, the footnoting of *Bureaucratic Justice* is spotty and the absence of a bibliography or table of references is an unnecessary handicap for the reader who is not intimately familiar with the literature Mashaw is synthesizing. In addition, the book probably owes an unacknowledged intellectual debt to prior social science work in the field. One apparently uncited study that comes to mind is Joel Handler's PROTECTING THE SOCIAL SERVICES CLIENT (1979), which makes a powerful case for the irrelevance and impotence of what Mashaw calls "external administrative law."

8. K. DAVIS, *supra* note 7, at 167. Though much of his discussion was devoted to police and prosecutorial discretion, Davis nonetheless made clear that welfare agencies like SSA also posed problems of discretionary justice. *See, e.g., id.* at 7-8:

> Some of our most important agencies are no more striving to achieve policy goals than are the courts; their prime focus and even their almost exclusive focus may be the administration of justice. Take, for instance, the Social Security Administration in its adjudication of claims. The answers are highly crystallized for old age and survivors claims, and com-

context of prosecutorial discretion, which was the primary focus of *Discretionary Justice*,[9] the answer to this question may not be as self-evident today as it was when Davis wrote it. As lawyers and social scientists have looked more carefully at the process of regulatory enforcement, it has become increasingly evident that the phrase "equally deserving" covers a multitude of difficult questions. Is it just for a regulatory enforcement officer to cite company A for a pollution control violation but to give company B more time for compliance because he believes that company B will have serious financial problems in abating its discharges?[10] What if A and B are illegally discharging the same toxic effluents, but B cannot install the necessary control equipment because its plant site is too crowded? Is it consistent with the notion of justice for an inspector to "bluff" a violator by threatening criminal prosecution, in a situation where the inspector knows that the penalty is trivial but the violator does not? Does an agency perpetrate an injustice if it seeks to induce compliance by getting the violator in trouble with another agency — for example, by opposing its pending license application? The concept of "equally deserving" provides at best limited guidance in resolving these morally debatable issues.[11]

Mashaw is sensitive to "the ambiguity and incoherence of the goals of the disability benefits program" he is analyzing (p. 52), and to the problems this poses for a concept of justice based on bureau-

puters do most of the work; . . . significant policy questions still arise and probably always will, but they are highly exceptional. The difficulties are in disability claims, which are often controversial . . . . Far from being a crusader for expanding social welfare, the Administration is trying to follow the intent of Congress as expressed in the statute and its legislative history, and the Administration is in general much less liberal to claimants than are the reviewing courts . . . . The task of the Administration is basically one of administrative justice, not one of formulating general policies in some legislatively-designated direction.

9. *Id.* Davis sought to distinguish prosecutorial or case handling discretion — which posed problems of legal justice — from policymaking, which posed problems of social justice. Thus, he argues:

> The major decisions reached in the White House are all discretionary but seldom involve discretionary justice — foreign policy, military policy, domestic policy in programs planned for congressional enactment. Such policies may contain ingredients of what we call social justice, but such policies seldom include determinations of rights of individual parties.

Id. at 6.

10. The examples are suggested by Keith Hawkins' participant-observation study of water pollution control enforcement in England. *See* Hawkins, *Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation,* 5 LAW & POLY. Q. 35 (1983).

11. For example, there is at present a lively debate in the journals over Professor Peter Westen's assertion that the notion of equality is an "empty" and "confusing" concept that takes its meaning only from normative standards that logically precede it. *See* Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982); Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules,* 91 YALE L.J. 1136 (1982); Westen, *On "Confusing Ideas": A Reply,* 91 YALE L.J. 1153 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen,* 81 MICH. L. REV. 575 (1983); D'Amato, *Is Equality a Totally Empty Idea?,* 81 MICH. L. REV. 600 (1983); Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply,* 81 MICH. L. REV. 604 (1983).

cratic rationality. In theory, "[a] pure model of instrumental rationality must presume that the values or reference goals for decisionmaking are absolute (that is, that the choice of one goal over another is not morally distressing), relevant, stable, consistent, precise, and exogenous . . ." (p. 52). But these conditions never apply in the real world, and so the agency is forced to define its means as well as its ends in the process of implementation. This is not to say, however, that bureaucratic rationality is unattainable or irrelevant whenever underlying policy goals conflict. "The managerial task," Mashaw concludes, "is to recognize emerging values or disvalues and to act to reinforce acceptable behavior while deterring the unacceptable. . . . [O]ne can certainly be critical of a system that fails to use hindsight to improve its administration" (p. 61).

Davis and Mashaw also differ in their assessments of the techniques that agencies can use to control discretion. Davis defines three methods that can be used to limit the discretion of low-level decisionmakers such as SSA disability examiners: confining discretion by substantive standards, usually administrative rules and principles promulgated by the agency; structuring discretion through openness and fair procedure; and checking discretion through review by higher officials.[12] For the most part, these techniques are explicated by normative argument and negative example rather than by systematic exploration of how they might function together within a single agency.[13] Mashaw's study has the advantage of a narrower focus on a single agency, as well as the empirical sensitivity that comes from prolonged exposure to the day-to-day workings of a bureaucracy. As a result, it paints a picture that is both more convincing in its detail and more disquieting in its implications.

Where Davis seemed to suggest that the control techniques could be easily implemented and would mutually reinforce each other, Mashaw's analysis tends to reject both of these assumptions. Assuring some minimal degree of consistency in claims adjudications is, as he describes it, an enormously difficult task that involves not only the legalistic approach of codifying decisional rules, but also the managerial problems of developing and implementing a quality control system for the decisionmaking process (pp. 149-54) and "engineering an adjudicatory culture" to produce the desired results (pp. 155-68). These various management techniques can easily contradict or undermine each other in ways that are difficult to foresee. Thus, a quality assurance project intended to correct the overly lib-

12. K. DAVIS, *supra* note 7, at 52-58, 97-98, 142-46.

13. This observation is not intended as a criticism of Professor Davis, for two reasons. First, *Discretionary Justice* was not written as an empirical work, but rather (as the subtitle indicates) as a "preliminary inquiry" at the theoretical level into the general problems of informal administrative action. Moreover, there was relatively little useful empirical data in the literature when Davis wrote his book.

eral interpretation of disability criteria in some state agencies produced the opposite excess, as disability examiners interpreted the reversals as a signal to run all of the presumptions against the claimant (pp. 159-60). Moreover, because the disability program is based on a concept of "cooperative federalism" in which state agencies make initial decisions subject to the review and oversight of SSA, the federal overseers do not enjoy the full range of normal management powers:

> SSA can attempt to elicit appropriate conduct by refining its instructions, by calling conferences between state agency heads and regional and central office personnel, and by processing routine [quality assurance] returns. But these informational devices . . . may have little or no effect. On the other hand, SSA can conduct an intensive review of some aspect of claims processsing, backed by the implicit threat of replacing the state agency for poor performance . . . What the SSA cannot do is make midrange management moves that would reinforce . . . an appropriate adjudicatory culture — selection, training, assignment, and promotion of personnel. . . . [P. 160].

In this complex world of contending forces and contingent powers, SSA's leadership can at best nudge and prod the recalcitrant bureaucracy, hoping that it will move a little way in the desired direction. From this perspective, Davis' image of the all-powerful supervisor checking and confining his subordinates' discretion must appear to be an impossible dream.

Mashaw's world of bureaucracy is thus a more ambiguous and realistic place than Davis' neat world of rules and standards, but Mashaw's sensitivity to the complexities of value and power conflicts leaves the reader with some uneasy feelings about the political legitimacy of the administrative agency. Mashaw gives some lip service to the traditional rationalization of the administrative agency as the mere instrument of legislative will,[14] but also frankly acknowledges the limits of that will. In a section appropriately titled, "Does Anyone Know What this Program is About?" (pp. 52-61), he catalogues some of the conflicting imperatives in the congressional mandate and concludes: "[T]he line that Congress drew through the ability — disability continuum when establishing its eligibility standard cannot be precisely located" (p. 56). For much the same reason, judicial review leaves the agency "a gigantic policy space, invisible to the legal order because devoid of justiciable rights" (p. 9). Congress might fill this gap through its powers to supervise administration, but here, too, the signals are mixed: "In oversight, budget, and legislative hearings, Congress has alternately berated SSA for its unrespon-

14. Thus, on page 25 Mashaw states: "Given the democratically (legislatively) approved task — to pay disability benefits to eligible persons — the administrative goal in the ideal conception of bureaucratic rationality is to develop, at the least possible cost, a system for distinguishing between true and false claims."

siveness to claimants *and* for its laxity in letting them on the rolls" (p. 20). Casework — the congressional handling of constituents' complaints about agency performance — serves mainly to frustrate the ideal of equal justice by forcing SSA to give some cases preferential treatment (p. 71).

The process of trying to reconcile these incommensurable values can be made to seem relatively systematic, as Mashaw does when he suggests that there may be a "Pareto optimality" of values:

> Such an evaluation [of SSA decisionmaking] asks how the decision structure as a whole, fosters or retards the realization of multiple values — values that, given our broad definition of efficiency, might be restated as involving rationality, efficiency, *and* process fairness. Changes that unambiguously increase the system's capacity to realize one or more of these values without sacrificing others are obviously desirable. Beyond these easy cases (should any exist), evaluative analysis can only weigh as carefully as possible the trade-offs among goals that are inherent in current processes or in proposals for reform. [P. 103].

Economic jargon aside, it seems doubtful that this sort of analysis can become much more systematic or objective than the loose interest-balancing traditionally used by the courts. As any law student can testify, interest balancing is a game in which the outcome depends very heavily on who is doing the balancing, and what values are allowed onto the scales — in short, on the balancer's ideology and social position. The question then arises: does *Bureaucratic Justice* provide anything more than Professor Mashaw's ideology — or, perhaps, the ideology of high-level SSA bureaucrats filtered through Mashaw?

The book attempts to deal with this problem in several ways. First, the three models of justice are empirically derived, at least in a loose anecdotal sense. Mashaw makes clear that his models represent attempts to synthesize strands in the critical literature (pp. 21-23), and he defines justice as "those qualities of a decision process that provide arguments for the acceptability of its decisions" (pp. 24-25). A second quasi-empirical approach to defining and weighing the interests is mentioned in Mashaw's discussion of the importance of error reduction as a system goal. "My reading of the history of the disability program, analysis of its procedural and evidentiary rules, and observations of its operations," he concludes, "reveal no strong reasons to believe that either type of error [that is, a wrongful grant or a wrongful denial of benefits] should be viewed as systematically more costly than the other. Caution and benevolence have, so far as I can tell, equal status" (p. 85). Building on this insight, Mashaw constructs a hypothetical "social benefits curve" to represent the societal costs of making different types of errors. The theoretical basis of this curve is an imaginary "perfect plebiscite in which

voters assign 'deservingness' numbers . . . to well-defined clusters of . . . personal characteristics" defining eligibility, and then "indicate the intensity of their joy or unhappiness at the prospect of a public transfer of a specified size being made to a person occupying determinate places" on the eligibility continuum (pp. 3-4 n.5). The conclusion is that because the social benefits curve is evenly sloped above and below the eligibility continuum, SSA need not be any more concerned about erroneous denials than about erroneous grants.[15]

The difficulty with these approaches to defining and weighing interests is that they may well overstate the degree of consensus within the society, and thereby unnecessarily constrict debate over the meaning of justice in the modern welfare state. This is perhaps best illustrated by reference to one strand of critical literature that Mashaw apparently omits from his synthesis, the radical left critique of Frances Fox Piven and Richard A. Cloward.[16] According to Piven and Cloward, the fundamental clash of values in welfare systems like SSA disability is not between benevolence and fiscal caution, but rather between repression of the poor and fear that they will revolt and disrupt the civil order:

> Administrative obstacles [to obtaining relief] reinforce legal exclusions in ensuring that those who are or might be workers do not get aid.
>
> Harsh relief practices serve to enforce work in another way as well. Some few of the very young, the old, or the disabled are allowed on the rolls even during the periods of political stability. But once there, they are systematically punished and degraded, made into object lessons for other poor people to observe and shun, their own station raised by contrast. . . . The exigencies of their political environment force relief officials to design procedures that serve the economic ends of groups outside of the relief system.[17]

In this bleak vision of the welfare system, the legislative and administrative history of a program like SSA disability would be interpreted much differently — perhaps as a cynical veneer of respectability for the system's repressive purpose, or as a kind of false consciousness — and the slope of the social benefits curve would be sharply skewed, depending on how one imagined the outcome of the hypothetical perfect plebiscite. Strategies for reform

---

15. Mashaw uses the following hypothetical to illustrate the differing error costs of cases that are factually clear, and those that are factually problematic:

> [A] decision classifying a decathlon gold medalist as disabled or a patient in a quasi-vegetative state as not disabled seems somehow a bigger, more costly error than the potentially erroneous assignment of the perennial marginal case (say a fifty-five-year-old, semi-skilled white male with high blood pressure and chronic lower back syndrome) to either category.

P. 82.

16. F. PIVEN & R. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971).

17. *Id.* at 147.

would surely be much more radical than the incremental adjustments proposed in *Bureaucratic Justice*.[18]

The fragility of Mashaw's social consensus assumptions can also be illustrated at the opposite end of the political spectrum, by noting the recent controversies inspired by Reagan appointees James Watt and Anne Gorsuch Burford in the field of environmental protection. Given this experience, it is perhaps not unrealistic to hypothesize the appointment of a leadership cadre at SSA who believed that ninety-five percent of all disability benefit claimants were goldbricking chiselers bent on raiding the federal treasury, and who defined their mission as cutting the disability rolls by at least two-thirds. This tilt toward fiscal "caution," if one could call it that, would surely fall outside the legislative and critical consensus that Mashaw defines, and would undoubtedly produce a more overt guerilla warfare between political appointees and career bureaucrats than Mashaw found at SSA. Would this situation still fit the model of justice through bureaucratic rationality that Mashaw defines? More broadly, what happens to the search for justice when the various empirical bases for defining agency goals pull in opposite directions, and signal the presence of bitter social conflict rather than broad consensus? Can we still be content with the bureaucracy's self-definition of its mission, knowing that the formal constraints and incentives that bind them are so tenuous?

This is not to suggest that any of the critics of the far left or right necessarily have a more correct understanding of the "true" nature of the SSA disability system than Mashaw, or a superior ideal of justice. But it does seem that attempts to separate bureaucratic or legal concepts of justice from the broader problem of social justice will often be futile. As Richard Stewart has noted, "in the absence of authoritative rules of decision, the resolution of the conflicting claims of a large number of competing interests is essentially a political process . . . ."[19] Agencies like SSA may try to resolve those conflicts in a rational, expert, and nonpartisan fashion, but this may just mask rather than alter the political character of the questions

18. *See, e.g.*, F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 275-76 (1977):

> In 1965 we had completed research showing that for every family on the AFDC rolls, at least one other was eligible but unaided . . . . If hundreds of thousands of families could be induced to demand relief, we thought that two gains might result. First, if large numbers of people succeeded in getting on the rolls, much of the worst of America's poverty would be eliminated. Second, . . . we thought it likely that a huge increase in the relief rolls would set off fiscal and political crises in the cities, the reverberations of which might lead national political leaders to federalize the relief system and establish a national minimum income standard.

19. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1790 (1975).

they are addressing. We cannot afford to become too complacent about the control and accountability of our public bureaucracies.

If *Bureaucratic Justice* can be faulted for failing to look beyond the comfortable tenets of centrist politics in its definitions of justice, it nonetheless is an exceptionally valuable book for anyone who is concerned about the role of law in the administrative state. Mashaw manages to range broadly without becoming superficial, and to present a coherent and challenging theory in lively, readable prose. *Bureaucratic Justice* seems certain to become a standard reference work for administrative lawyers, and for anyone else who seeks the elusive goal of developing more humane and more effective public bureaucracies.