Introduction

Jerry L. Mashaw's Creative Tension with the Field of Administrative Law

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In the United States, the subject of federal administrative law – the body of law that constitutes, empowers, and constrains federal bureaucratic agencies – is both timeless and timely. Timeless because national bureaucracy is an enduring and probably inevitable presence in this country as in all large wealthy democracies. Timely because, amid the patterns of ideological polarization and divided government that have dominated our era, the flow of congressional legislation is frequently blocked, leaving the bureaucracy as the primary arena for struggle over policymaking.

This volume assembles the latest work on US administrative law by nearly two dozen scholars in the area. The focal point for their contributions is the work of Jerry L. Mashaw, a figure widely admired despite (or perhaps because of) his ambivalent relationship to the field. On the one hand, Mashaw is the consummate insider: a professor at Yale Law School since 1976 and holder of a Sterling chair, the university's highest honor; three-time winner of the ABA Administrative Law Section's award for scholarship; and public member of the Administrative Conference of the United States. On the other hand, Mashaw is an outsider. Throughout his career, he has been trying to persuade scholars of administrative law that their field is misconceived in both its premises and focus. He has pushed boundaries, composed sweeping indictments, built bridges to other disciplines, and illuminated alternative ways of seeing. He has lived in never-ending creative tension with the field he calls home. The contributors to this volume – in their critiques, interrogations, and extensions of Mashaw's provocative work – provide a collective account of administrative law's commitments, possibilities, limitations, and strains as an approach to governance and as an intellectual enterprise.[1]

[1] Not that Mashaw's scholarship has been confined to administrative law. He has also published extensively on the substantive law and policy of social welfare benefits. E.g., Michael J.

I AN INTERNAL LAW OF ADMINISTRATION

The dominant concerns of federal administrative law as an academic field, from at least the 1930s through to the present, have been: (a) how Congress delegates power to agencies through statutes; and (b) how federal courts control an agency's actions through lawsuits, usually to ensure conformity with a congressional statute.[2] The reasons are not far to seek. Congress is the font of democratic legitimacy in the nation's traditional constitutional theory. And courts are the traditional model for legitimate decision-making in the mind of the legal profession, in which most law professors are socialized. The academic field's focus on statutes and lawsuits is consistent with a broader sentiment in the nation's political culture that, in order to subject our government to the rule of law, we cannot trust the agencies themselves and must rely instead on officials external to the bureaucracy – that is, elected lawmakers and life-tenured judges. Thus "administrative law" has been largely synonymous with external constraints – statutory and especially judicial – on agency action.[3]

To Mashaw, this is a mistake. We are not wrong in our aspiration to subject government to law. But we are wrong to think that exacting statutory commands and judicial review are the means to fulfill that aspiration. Instead we should look to the agencies themselves. An agency, under the right conditions, can self-generate law from within – and do it far better than elected lawmakers or courts can. This is the thesis of Mashaw's *Bureaucratic Justice* (1983), perhaps his most enduring book.[4] It is a case study of Social Security Disability Insurance (SSDI), the largest system of administrative adjudication in the Western world. Mashaw finds that the Social Security Administration (SSA) self-generates law quite successfully in its administration of SSDI. And he believes that SSA's success reflects much broader possibilities for the generation of law within agencies. Hence the title of *Bureaucratic Justice*'s opening

Graetz & Jerry L. Mashaw, True Security: Rethinking American Social Insurance (1999); Theodore R. Marmor, Jerry L. Mashaw, & Philip L. Harvey, America's Misunderstood Welfare State: Persistent Myths, Enduring Realities (1990).

[2] On the process by which administrative law came to focus on the external constitutional environment of the agency more than on the agency's internal practices, between about the 1910s and 1930s, see G. Edward White, The Constitution and the New Deal 94–127 (2000); Kevin M. Stack, *Reclaiming "the Real Subject" of Administrative Law*, Introduction to Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers (Lawbook Exchange 2014) (1903).

[3] Since the 1980s, there has been one major exception to the focus on Congress and courts: increased scholarly and pedagogical interest in how agencies are affected by the President (still an external actor). This is discussed in Section II of this Introduction, *infra*.

[4] Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (1983).

chapter: "The Quest for an Internal Administrative Law," a quest that is not only SSA's but Mashaw's own.

What is this "law" that Mashaw insists agencies can produce within themselves? He never explicitly defines law, though his discussion makes fairly clear what he has in mind. He begins with some familiar positivist markers, as when he says that "internal law exists [at SSA] in the sense of norms backed by sanctions" and that "these norms are recognized and acted upon by the relevant officials." But this is not all that defines law for Mashaw, or, at least, not all that defines law worth having. Mashaw's concern is "not just whether (on some plausible conception) an internal administrative law exists, but whether that law can make persuasive claims to provide an acceptable system of administrative justice."[5] He seeks to "affirm a vision of administration that is subject to the normative evaluation and improvement that is the promise of legal discourse."[6] He wants norms not merely that are backed by sanctions and recognized and followed by officials in the positivist sense, but that are "capable of generalization, critique, improvement; even of producing a sense of satisfaction, acceptance, and justice" among the people who are governed,[7] in other words, a law "that will satisfy our demands for legitimation of the exercise of administrative power."[8]

To subject our government to law that has these characteristics, Mashaw believes that we cannot rely upon elected legislators or courts. Rather:

> 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. . . . The twists and turns of political agendas, the episodic and random interests of courts and of outside commentators provide information on social perceptions and expectations and shed some light on the ultimate effects of bureaucratic routines. But the job of evaluating the significance of these external communications and, having thus evaluated them, responding with appropriate action can reside only with the bureaucracy itself.[9]

The only actor capable of subjecting government to law of the kind that meets Mashaw's standard is the agency. True administrative law must be internal.

But, of course, the agency is a "they," not an "it." What does Mashaw mean when he says "the bureaucracy itself" must be relied on to produce law? The content and nature of agency-generated internal law – and the persons within the agency who create it – can vary. In the case of SSA,

[5] *Id.* at 213. [6] *Id.* at 14. [7] *Id.* at 15. [8] *Id.* at 213. [9] *Id.* at 15.

the dominant type of internal law is bureaucratic rationality. SSA managers reduce the disability program's vague and competing goals to rules that are relatively objective, even to the point of being crude, but have the virtue of rendering the decisions of thousands of low-level SSDI examiners more transparent, replicable, consistent, and capable of being evaluated for accuracy and procedural fairness. The main protagonists in this story are the SSA's high-level career managers, who formulate the rules and design the quality assurance systems by which those rules are implemented and evaluated.

Yet bureaucratic rationality is not the only species of internal law, nor are high-level career managers the only agency personnel capable of making internal law. One alternative that Mashaw recognizes is professionalism. At SSA, the professionals that Mashaw has in mind are physicians and vocational counselors who provide opinions to the examiners on the physical ability and employment capacity of people applying for benefits. These doctors and counselors have norms that they recognize and follow (though the norms are client-oriented and contextual, rather than objective and transparent); those norms are susceptible to reform efforts (but more through the agency's choice of which professionals to rely on, and how much, not through box-checking quality assurance review of the professionals' decisions); and the norms may help render decisions acceptable to citizens seeking benefits (perhaps more effectively than faceless bureaucratic rationality can do).[10] In fact, bureaucratic rationality and professionalism coexist in the SSDI program, in uneasy tension. The managers and quality assurance analysts are dominant, which Mashaw thinks is largely sound, while doctors and vocational experts play a more circumscribed role, which Mashaw thinks the managers might expand on a limited, experimental basis.[11] What matters, for our purposes, is that an agency's internal law may consist of multiple kinds of norms that exist simultaneously. What they have in common is that they arise within the agency and serve law's purposes: to constrain official action, serve as workable focal points for reform, and foster legitimacy.

Moreover, the agency's self-generation of internal law in all its variety can serve law's purposes better than do Congress or the courts. To be sure, Mashaw countenances *some* role for Congress in creating the law to which the government is subject. Congress's proper role is to define the goals of a program that the administering agency should pursue.[12] But, insists Mashaw, we are mistaken to think that law's purposes will be fulfilled if only we can get

[10] *Id.* at 26–29, 32–33, 35–36. [11] *Id.* at 37–40, 202–09.
[12] Thus, Mashaw's discussion of the varieties of internal law begins with the Social Security Act – the "skeleton" that SSA must "flesh out." *Id.* at 23–24.

Congress to write *highly specific* statutes to govern the agency.[13] Presumably Mashaw would also admit that members of Congress have some salutary role to play in their oversight activities. Lawmakers may be prominent among the above-mentioned "outside commentators" who provide the agency with useful "information on social perceptions and expectations and shed some light on the ultimate effects of bureaucratic routines."[14] But it must be left to the agency to evaluate this information and decide how best to respond to it.

If the positive contribution that Congress can make in subjecting government to law is limited, the positive contribution that courts can make is even smaller, and often offset by the damage they do. In Mashaw's words, "the history of American administrative law is a history of failed ideas. Administrative law's basic technique for formulating and implementing guiding legal norms – lawsuits asserting private rights and challenging the legality of official action – seems to have forced it to oscillate continuously between irrelevance and impertinence."[15] Courts are irrelevant when they review the individual SSDI decisions on which disappointed applicants happen to sue. Applicants sue in only a tiny and unrepresentative fraction of SSDI cases, and even if they sued more frequently, the suits are so idiosyncratic in their facts and so numerous and scattered across different judges that the judiciary is incapable of providing useful guidance for SSA's mine run of applications. Meanwhile, courts are impertinent when they make orders going beyond an individual decision, for such orders implicate managerial problems "too subtle, too connected with other aspects of the system's operations, to permit sure-handed judicial remedies," as when a court's injunction to reduce a backlog causes the agency to speed up its decisions in ways that render them cursory and inaccurate.[16]

Bureaucratic Justice's total rejection of courts' capacity to foster internal law is a view that Mashaw reached gradually in the years leading up to the book's publication in 1983. When he first began studying social welfare benefit programs in the early 1970s, he immediately recognized that the liberal aspiration to subject these programs to the rule of law needed to rely upon internal law, such as quality assurance programs to encourage consistent, accurate, and transparent decision-making for the bulk of applications. In this respect, the early Mashaw was already at odds with the Supreme Court, which at the time (in *Goldberg* v. *Kelly*[17]) was seeking to promote legality in benefit programs by making the agency's *individual* decision-making process look like a court's

[13] *Id.* at 181–85. *See also* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81 (1985).
[14] Mashaw, *supra* note 4, at 15. [15] *Id.* at 1. [16] *Id.* at 185–90. [17] 397 US 254 (1970).

individual decision-making process, despite the fact that most benefit applicants had no lawyers and were ill-positioned to take advantage of court-like procedures. Nonetheless, argued Mashaw in a 1974 article titled "The Management Side of Due Process," courts could still foster the kind of law that agencies really needed – the internal law of bureaucratic rationality – by issuing broad injunctions telling agencies to adopt quality assurance systems. The idea was not for courts to review individual benefit decisions (or to remake the agency's individual process in the image of courtroom process), but instead for courts to order the reorganization of benefit-granting agencies into more rational bureaucracies, much as courts were then seeking to do with prisons.[18] By 1980, after leading a research project on SSDI for the American Bar Association's National Center for Administrative Justice,[19] Mashaw became "less convinced" that this kind of structural litigation was "the most appropriate vehicle for dealing with quality assurance issues,"[20] and by the time *Bureaucratic Justice* appeared, he concluded that such litigation was both untenable as a matter of law and undesirable as a matter of practice.[21]

Probably the biggest critique that one can level at *Bureaucratic Justice* is to question whether the success of internal law documented therein is replicable beyond SSA. One might argue that internal law's flourishing at SSA was the result of an unusually hospitable environment. Mashaw himself seems to admit as much in the book's final chapter, when he briefly catalogues all the favorable circumstances SSA enjoys: wide acceptance of its program, little politicization, little fear of high-salience disasters, a dedicated group of civil servants with esprit de corps, and no debilitating split in culture among its employees.[22]

Mashaw's most important response to this critique appears in his most recent book, *Creating the Administrative Constitution* (2012), which is a history of the federal bureaucracy, viewed through the lens of law, from the founding through the end of the nineteenth century.[23] One of the main reasons Mashaw opts to study pre-1900 federal administration is that it constitutes a kind of natural experiment to test the viability of internal law in American political culture. Judicial review of agency action, as we know it, came into existence

[18] Jerry L. Mashaw, *The Management Side of Due Process*, 59 Cornell L. Rev. 772 (1974).
[19] Jerry L. Mashaw et al., Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System (1978)
[20] Jerry L. Mashaw, *How Much and of What Quality? A Comment on Conscientious Procedural Design*, 65 Cornell L. Rev. 823, 834 (1980).
[21] Mashaw, *supra* note 4, at 185–90, esp. 187 n. 12. [22] *Id.* at 216–17.
[23] Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012).

only around 1900.[24] Yet as Mashaw finds, federal agency officials prior to 1900 – even without the judiciary looking over their shoulder – tended frequently and almost inexorably to channel their organizations' decisions through procedures that we associate with the rule of law. In many of the federal departments and offices that made the largest number of decisions affecting individuals – including the settlement of accounts with the federal government, claims to western land, applications for veterans' pensions, and prohibitions on using the mail for fraud or obscenity – Mashaw documents a steady accretion of internal law. On an ever-increasing basis, agency managers wrote rules to control the masses of decision-makers; kept records and deployed inspectors to enforce those rules; made sure that the most consequential decisions were made (or at least reviewed) at national headquarters; used informal means (prior to civil service reform) to insulate decision-makers in individual proceedings from patronage politics and from the agency's other personnel; published their rules and eventually their individual decisions; and allowed individuals whose interests were affected by agency decisions to have hearings with notice, access to counsel, and appeals to higher officials.

Mashaw, by his own admission, gives relatively little attention to what *caused* nineteenth-century administrators to adopt all these norms; what matters to him is *that they did so*,[25] and did so in many disparate areas without prompting from courts, nor, for that matter, from Congress, which prior to 1887 almost never specified internal agency adjudicatory procedures in statutes.[26] "Our administrative constitution," concludes Mashaw, "has always relied on the internal law of administration for the effective implementation of its governing principles – and for their generation as well. That truth was simply easier to see in a nineteenth-century America where external legal constraints on

[24] Up till about the turn of the twentieth century, the opportunity for an aggrieved person to sue a federal agency was largely confined to: (a) seeking a writ of mandamus to compel official action, which was only available if the officer's duty was nondiscretionary; or (b) bringing a common-law tort action (often in state court) against a federal official for damages arising from acts already taken. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946–53 (2011) (reviewing literature). In the tort actions, the federal official could raise, as a defense, the fact that his conduct had been authorized by a federal statute. If the official were held liable, Congress or the agency often indemnified. These tort actions were confined to areas where official action approximated a common-law injury (e.g., seizures of property, as distinct from claims for pensions, patents, use of the mail, etc.), and even in those areas, there is little known evidence of their systemic effect on administrative behavior. By contrast, modern judicial review of agency action (originating in judge-made equity and piecemeal statutes around 1900 and codified in the Administrative Procedure Act of 1946) is far more comprehensive and forward-looking.

[25] MASHAW, *supra* note 23, at 16–17. [26] *Id.* at 251.

administration seem, if anything, weaker than they are today."[27] These findings implicitly respond to the criticism of *Bureaucratic Justice* that SSDI is too singular a case study on which to base a theory of law and administration that ranges broadly across government.[28]

Besides providing wider-ranging evidence for agencies' tendency to self-generate law internally, *Creating the Administrative Constitution* affords Mashaw an opportunity to elaborate on the concept of internal law at the theoretical level. Two of his points are especially worth noting. First, in answer to the possible objection that self-generation of law by unelected bureaucrats is undemocratic, Mashaw insists that such law is actually a precondition for administrators to have any kind of accountability to elected officials (and, for that matter, to courts). The notion that the government will obey a statutory directive (or a judicial judgment) is premised on the idea that the higher-level officials at whom the statute or judgment is directed can actually shape the behavior of operators on the ground. "The litigant and Congress assume, in effect, that there is an internal law of administration by which higher-level officials instruct subordinates and through which they can call them to account for their actions."[29] Second, in answer to the possible objection that an agency's web of internal rules and practices is not "really" law in the sense of (say) criminal law or private law, Mashaw responds that such internal rules and practices deserve the moniker "law" at least as much as any other variety of domestic public law, such as constitutional law or external administrative law. *None* of these forms of public law rely upon hard enforcement or sanctions in the sense that criminal law is often thought to rely upon imprisonment, or private law upon the sheriff's power to seize property. The "lawness" of constitutional law or external administrative law consists in the fact that these bodies of norms are routinely recognized and followed by the relevant legislative, judicial, and executive officials. Routine recognition and obedience among the officialdom likewise characterize an agency's internal norms. So these, too, are law.[30]

Part I of this volume assembles five essays engaging with Mashaw's conceptualization and defense of internal administrative law. In the first, Thomas Merrill (Chapter 1) focuses on what he considers a tension between *Bureaucratic Justice* and another of Mashaw's books, *Due Process in the Administrative State* (1985), which also focuses on welfare benefits but from the point of view of constitutional jurisprudence. *Due Process in the Administrative State*, says

[27] *Id.* at 314.
[28] See particularly *id.* at 266–67 (noting that not all persons to whom pre-1900 agencies afforded internal-law protections were politically popular, such as mail users accused of fraud).
[29] *Id.* at 7. See also *id.* at 9, 179. [30] *Id.* at 280–82.

Merrill, belongs to a genre of "constitutional scholarship of the 1970s and 1980s" that "has largely passed from the scene" – one that offered interpretations of the constitution (here, of the Due Process Clauses) on the basis of philosophy to the near exclusion of text, history, and structure. Soon after the Supreme Court tried imposing court-like procedures on agencies in *Goldberg*, the justices retreated in *Matthews* v. *Eldridge* (1976)[31] to hold that an agency procedure would satisfy due process so long as it passed a vague utilitarian cost–benefit test. *Due Process in the Administrative State* mounts a fierce critique of this utilitarian doctrine, arguing instead that courts should formulate due process in a manner that aims to preserve individual dignity, albeit in a modest way, bound by precedential and analogical reasoning whenever possible. Merrill sees an inconsistency between the anti-utilitarian, pro-dignity argument of *Due Process in the Administrative State*, on the one hand, and *Bureaucratic Justice*'s defense of SSA's essentially utilitarian quest to rationally administer disability benefits, on the other. But Merrill suggests the two may be reconciled partly by recognizing that the correct answer to the question "What process is due?" depends on the identity of the actor responsible for answering it. That is, utilitarianism may well be the highest consideration in how to devise an administrative process, but it is the agency, not the judiciary, that has the information and capacity to decide whether utilitarianism has been properly implemented. When *courts* are called upon to decide whether an agency proceeding provides due process, they should confine themselves to ensuring that the agency has done the requisite minimum for the value (individual dignity) that courts are institutionally suited to vindicate. Ultimately, Merrill enlists Mashaw's findings on the robustness of internal law to argue that the entire *Goldberg–Eldridge* line of cases, which set up judges as evaluators of agencies' benefit-granting processes, is misguided – and that we should be glad it has "fizzled out" since the 1980s.

Charles Sabel and William Simon evaluate *Bureaucratic Justice*'s concept of internal law against the background of changes in welfare policy since the book's publication three decades ago (Chapter 2). Due to changes in the labor market, fiscal pressures, and political ideology, many welfare agencies have shifted away from handing out money to people meeting certain qualifications (the model of SSDI in 1983) and toward providing educational, rehabilitation, and other services to people in need so they can fend for themselves. This new approach is not suited to the kind of highly objective rules and tight hierarchical control that Mashaw documented at SSA in the 1980s, and those arrangements accordingly play less of a role in the world of welfare than they

[31] 424 US 319 (1976).

once did. Increasingly, agencies seek to provide each benefit applicant with a more individualized package of services aimed at meeting his or her particular needs. This individual tailoring means high-level managers must adopt a flexible approach that encourages initiative and creativity on the part of the low-level bureaucrats who actually work face-to-face with the applicants. This shift toward individualized responsiveness mitigates the tension, noted by Merrill, between the rational management Mashaw praised in *Bureaucratic Justice* and the values of individual applicant dignity and participation that he worried about in *Due Process in the Administrative State*. Sabel and Simon agree with Mashaw that a rational, meliorable, and legitimate approach to social welfare can be achieved only if it is built into the internal structure of the agency. However, Sabel and Simon reject the view of *Bureaucratic Justice* that broad judicial injunctions are ineffective in getting agencies to develop such internal law. Indeed they argue that structural reform litigation has undergone a similar shift to that in welfare administration, from top-down micro-management to the salutary fostering of frontline experimentation. Courts are demanding that agencies figure out how to vindicate a "right to responsible administration," in effect if not in name. In Sabel and Simon's view, Mashaw had it right back in the early 1970s, in "his initial conviction that 'external,' judicial intervention can be crucial to fostering due process from within."

If internal law is so important and, in some ways, attractive, why does external law continue to dominate administrative law as an academic field? Possibly this has something to do with the pedagogical approach of American law schools, particularly the focus in most courses on appellate judicial opinions to the near exclusion of other primary materials (the "case method" that originated at Harvard nearly 150 years ago and spread nationwide). Thus, today's typical student in an administrative law course will learn about agencies *solely* by seeing how appellate courts summarize those agencies' actions and evaluate their legality – a wholly external perspective in which administrators are never heard to speak for themselves. Peter Strauss's essay (Chapter 3) traces how, from the early 1900s to the present, the external perspective has dominated administrative law textbooks, with very few exceptions, one being Mashaw's textbook with Richard Merrill, which, in its first edition of 1975, engaged with legislative and administrative materials unmediated by courts,[32] until the authors conformed more to convention in subsequent editions. Strauss further considers whether the recent advent of first-year courses on legislation and regulation (overlapping with, but not identical to, the familiar upper-level

[32] Jerry L. Mashaw and Richard A. Merrill, Introduction to the American Public Law System: Cases and Materials (1975).