

## The Management Side of Due Process in the Service-Based Welfare State

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The American social welfare system is evolving away from the framework established by the New Deal and elaborated during the civil rights era. It is becoming less focused on income maintenance and more on capacitation. Benefits thus more often take the form of services. Such benefits are necessarily less standardized and stable than monetary ones. Their design is more individualized and provisional. The new trends favor different organizational forms, and they imply a different ideal of procedural fairness.

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

In this essay, we consider how key trends of recent decades fit with Mashaw's analysis. In some respects, they represent a vindication of Mashaw's aspiration to accommodate procedural fairness and organizational efficacy. In others, they require substantial modification of his account of the administrative state. Notably, the tension or trade-off between bureaucratic rationality and individualized decision-making that preoccupies much of Mashaw's analysis is mitigated in novel ways in the newer programs.<sup>1</sup> The new programs depend on the tailoring of services to the individual circumstances of the beneficiary. Because they require information and cooperation from the beneficiary, they must involve him or her in the design of the intervention. Yet, at the same

<sup>1</sup> Tom Merrill emphasizes this tension or trade-off in his contribution to this volume.

time, these programs aspire to use technology and managerial techniques to hold frontline agents accountable in ways different from those Mashaw contemplated. Mashaw thought of accountability partly in terms of fidelity to hierarchically specified instructions – what he called “accuracy.” However, this ideal does not fit organizational programs that need to encourage and learn from frontline initiative and creativity. Such post-bureaucratic programs understand accountability in terms of both the frontline agent’s ability to give a reasonable and articulate explanation of her actions and of continuing assessment of the effects of these actions.

## I THE NEW DEAL REGIME

### *A Basic Structure*

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

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

The statute gave primary administrative responsibility for the social insurance programs for non-workers – the retired, their dependents, and survivors – to the federal government. It gave primary responsibility for the public assistance titles and Unemployment Insurance to the states. When parallel social insurance and public assistance programs for the disabled were added,

responsibility for the critical determination of inability to work was given to the states, where it remains today.<sup>2</sup>

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

First, *professional expertise*. Expertise was understood as practically efficacious scientific knowledge developed and transmitted through universities and professional bodies. The paradigm of expert judgment was a decision by a professional grounded in a discipline like medicine or engineering applying general principles to a concrete problem. Such judgments could be explained only to a limited extent even to peers, and much less to laypeople. Their plausibility depended as much on the qualifications of the persons making them as on their terms. Administratively, expertise operated at two levels. At the top of the agency, senior officials made general policy decisions, which they transmitted to subordinates through rules. At the bottom, there was limited scope for professional judgment when rules ran out, or conflicted. Judgments of this sort by doctors and vocational experts played an important role in the disability programs.

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

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

<sup>2</sup> The federal government assumed administrative functions other than disability determination for the means-tested old age and disability programs in 1974, when the programs became known as Supplemental Security Income. On the substantive premises of the New Deal regime and their evolution in the civil rights era, see MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* (1978); VINCENT J. BURKE, *NIXON'S GOOD DEED: WELFARE REFORM* (1974).

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

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

Civil-rights-era developments tended to tip the balance between expertise and bureaucracy toward bureaucracy at the front line, while entrenching the role of the hearing as a safeguard against errors in regimes of increasingly exhaustive general rules.<sup>3</sup> The activism of the civil rights era focused on maladministration of the means-tested programs at the state level. Two reforms in AFDC were especially salient.

First, in *Goldberg v. Kelly*,<sup>4</sup> the Supreme Court confirmed the role of quasi-adjudicatory hearings as the principal form of rights protection in welfare programs. This was basically the role envisioned in the Social Security Act. The Court’s innovations were that the hearings mandated by the Act would often be constitutionally required and that sometimes (depending on the importance of the benefits and the reliability of the line decision-making process) they must precede termination of benefits rather than, as the Act permitted, follow it. The *Goldberg* jurisprudence also emphasized the importance of differentiating the hearing officer from the line decision-making process.

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

<sup>3</sup> See generally William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

<sup>4</sup> 397 US 254 (1970).

qualified applicants, allied with the liberal proponents of more specific rules.<sup>5</sup>

The upshot of this alliance was that professional judgment was gradually eliminated from line decision-making in programs providing monetary benefits. The welfare workers' job was redesigned as clerical, so that social workers were not needed. Something similar, though less pronounced, happened in the disability programs, as the roles of vocational and medical experts were strongly reduced by regulations dictating decisions on the basis of a limited number of specifically defined contingencies – the “listed impairments” and the vocational “grid.”<sup>6</sup> There were, to be sure, limits to the resulting bureaucratization of administration, as the proliferation of rules created, by their conflicts, new opportunities for ground-level discretion even as they limited existing ones. But the residual professionalism and discretion of eligibility workers, like other “street-level bureaucrats” (the classroom teacher, the case-worker, the officer on the beat), was seen as an unfortunate cost of operating a bureaucracy serving complex goals, rather than a valuable resource for contextualized decision making.

### B *Mashaw and the Right to Good Administration*

In seminal work from the 1970s through the 1990s Mashaw elaborated a synthesis of these developments, showing how administrative organization could serve the constitutional values at stake in *Goldberg v. Kelly*. His starting point, in *The Management Side of Due Process*,<sup>7</sup> was the emphasis in *Goldberg* on the need to ensure the effectiveness of constitutional remedies by tailoring them to the actual circumstances of the groups whose rights were at risk. It follows, he argued, “that when due process cannot be assured by trial-type hearings, additional or different techniques for assuring fairness become appropriate.” In the setting of social service provision these “different techniques” were

<sup>5</sup> A partial countertrend to the move toward rules can be seen in the suggestion that a fairness issue of constitutional magnitude might arise when inflexible rules resulted in the arbitrary underinclusion of needy people in welfare programs. The Warren Court's brief flirtation with the “irrefutable presumption” doctrine is the most salient manifestation. However, this concern seems to have been reconciled with bureaucracy by the premise that, where lower-level complex judgment was desirable, it should, or at least could, be confined to hearing officers in a setting differentiated from line administration.

<sup>6</sup> The grid's suppression of individualized judgment was challenged on due process grounds but upheld in *Heckler v. Campbell*, 461 US 458 (1993).

<sup>7</sup> Jerry L. 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).

likely to be measures integrated with line administration, which detected and corrected potential errors *before* they resulted in final, rights-infringing decisions. When hearings cannot assure the necessary accuracy of administrative decision making, Mashaw concluded courts should impose a “comprehensive quality assurance program” by way of remedy.

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

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

Quality control at the Veterans Administration focused less on unearthing information ignored by routine collection methods and more on inducing local and regional managers to agree on and consistently apply criteria for decision-making. A key component of the Statistical Quality Assurance System was a daily review of a random sample of each local unit’s work product by a reviewer attached to the regional office. Reports on errors were sent to the regional and the national Office of Appraisal. The national office scanned the reports, looking for trends. But it also conducted its own monthly, random-sample review of each station’s work. Discrepancies between the patterns of error detected in these reviews and those reported by the regional reviewer raised questions about the quality of local self-monitoring and triggered further inquiry at the regional and station levels. At the same time, the practice of returning each file judged to contain an error to the initial adjudicator compelled clarification (and presumably thereby also modification) of policy. The initial decider could agree or disagree with the review finding. In case of disagreement, the dispute passed to a higher authority for resolution.

These demonstrations of the feasibility of organizational or managerial responses to due process concerns were all the more significant because of concurrent innovations in judicial remedies in cases of persistent institutional failure implicating constitutional rights. Mashaw noted that in a line of cases involving prisons, juvenile detention centers, and homes for the mentally disabled, it was becoming “increasingly commonplace” for courts to respond to continuing abuses by requiring submission of a plan for reform while retaining jurisdiction to ensure the plan was carried out. Abram Chayes would shortly thereafter characterize such intervention as “public law litigation” and Owen Fiss as the “structural injunction.”<sup>8</sup>

For Mashaw, the similarities between these custodial-care cases and AFDC maladministration were “striking.” The triggers for official intervention were the same: “Program performance is widely considered to be much below par; constitutional rights of a ‘basic decency’ or ‘fundamental fairness’ sort are involved . . . and administrative attempts at reform have failed to deal with the special conditions of the populace which is served by the program.” So too were the remedies. In requiring “that certain management functions be routinely carried out by qualified staff as a means for ensuring a continuous program performance which is up to minimal professional standards,” he observed, the courts’ remedial approach in the custodial care cases “has much in common with a quality control system.”<sup>9</sup>

In expressing optimism about such reforms, Mashaw, Chayes, and Fiss were swimming against the intellectual tides of their day. The leading students of organization, and public administration in particular, were concluding that bureaucracies were incapable of learning. In the following years, for example, James Q. Wilson published influential studies of the police, the FBI, and narcotics agents arguing that supervisors’ inability to observe, let alone review, the decisions of subordinates left scant possibilities for managerial control of behavior.<sup>10</sup>

Yet Mashaw stood his ground in *Bureaucratic Justice: Managing Social Security Disability Claims* (1983). In one part of the book, he contrasted decision-making in two states. In one, the disability insurance administration was part of the state welfare department, and its staff had the same low entry qualifications and was classed on the same low pay scale as other social welfare workers making eligibility determinations. In the second, the administration was part of the state education department; examiners were classed

<sup>8</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen Fiss, THE FORMS OF JUSTICE, 93 HARV. L. REV. 1 (1979).

<sup>9</sup> Mashaw, *supra* note 7, at 820.

<sup>10</sup> E.g., JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR (1978); JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS (1982).

as “counselors,” expected to hold or acquire a master’s degree in vocational counseling, were paid accordingly, and in consequence had a more “professional” outlook on their jobs. The difference in outcomes was dramatic. In the welfare agency, line examiners prioritized rapidity above all else (as delay was the easiest error for supervisors to detect), which resulted in an “atrocious” QA score. In the more professional administration “there was continual discussion among examiners and with supervisors and medical consultants about ongoing cases and problems.” The QA error rate was among the lowest in the country.<sup>11</sup> Although such comparisons are inevitably incomplete, the strong suggestion is that, at least under favorable conditions, some forms of “professional” autonomy in combination with the feedback of “quality control” can produce reliable, institutional learning.

It is the promise of this capacity for internal self-reflection and correction, as opposed to accountability achieved through political oversight or judicially styled review, that undergirds Mashaw’s renewed call in *Bureaucratic Justice* for a “right” to “good administration.”<sup>12</sup> The question hanging fire at the end of the book, and still now (and the reason “right” is in scare quotes), is how, if at all, this right is to be vindicated.

But bold and resolute as he was, even Mashaw could not foresee from the vantage point of the 1980s the transformation that was to occur in social welfare and the very nature of organizations in the ensuing decades. In several social welfare programs, the emphasis would shift from monetary benefits and binary eligibility decisions to the provision of complex services. In “quality control” the focus of concern would extend from the question “Are we executing the rules and routines as intended?” to the question “Do the rules and routines serve their intended purposes?” The information exchanges across organizational levels prompted by these questions would transform the bureaucracy and begin to give new meaning to the very idea of a rule. All this would make Mashaw’s right to good administration more urgent, more demanding – and more feasible.

## II THE SERVICE-BASED WELFARE STATE AND POST-BUREAUCRATIC ORGANIZATION

The New Deal welfare state that Mashaw described and the economy to which it responds are undergoing profound changes. In circumstances of

<sup>11</sup> JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 161 (1983).

<sup>12</sup> *Id.* at 226.



uncertainty – the inability to predict, let alone estimate the probability of, future states of the world – organizations in both the private and public sector are becoming more responsive to changing circumstance. They do this by authorizing, rather than as in bureaucracy, silently tolerating, the exercise of discretion in the application of rules at the ground level but requiring that these decisions be made explicit and justified in light of the decisions of others in similar circumstances.

For the welfare state, the rise of uncertainty means an increase in non-actuarial risk, dangers too unpredictable to allow for risk sharing through insurance-type programs.<sup>13</sup> Thus, we see a gradual shift to the prevention of harm rather than the palliation of its effects. More precisely, the shift is from provision of welfare benefits in the form of monetary grants to services designed to enable citizens at various points in the life course to acquire the skills and other capacities they need to master and mitigate the risks they face. Risks are typically rooted in compound problems; labor market difficulties are tied to financial or family stress and educational deficits. Thus, services have to be tailored to the needs of particular groups, and revised as the diagnosis of problems changes in response to the effects of treatments. These changes have been re-enforced by changes in the self-understanding of beneficiaries themselves, who increasingly insist on active participation in social life rather than passive material support.

Dramatic increases in the claims for disability benefits in the OECD countries in the last decades clearly illustrate the limits of the traditional welfare state model. In the Netherlands, Denmark, and Norway, among others, the provision of services adjusted to individual need have had significant success in mitigating the harms and costs of disability. In the United States, for reasons that Mashaw clearly foresaw, the defects of the insurance model have been especially egregious and hard to correct.

### A *From Grants to Services*

Begin with the general shift in welfare provision. A crucial indication of the shift from compensatory remediation to capacitating prevention is the increasing view of education at all levels as the foundation of welfare. Until recently, discussion of the welfare state often ignored education. Since most workers were expected to acquire skills on the job or through some form of apprenticeship or other vocational training, education through secondary school was

<sup>13</sup> See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

assumed sufficient and its quality was not viewed as critical to economic success. Today, it is difficult to acquire robust skills by advancing over a period of years from one job to another; vocational training typically requires more than basic levels of literacy and numeracy; and skills, once acquired, have to be renewed to keep up with technological change. At the same time, unemployment is less manageable through macroeconomic interventions, and structural adjustments – abrupt shifts in the conditions of competitiveness of whole industries or branches of activity, with attendant devaluation of skills – are more frequent than policymakers once hoped. Employability for the general population accordingly depends on much higher educational attainments than before.

The No Child Left Behind Act of 2001 invoked egalitarian and antipoverty values as the central rationales for federal intervention in basic schooling.<sup>14</sup> The increasingly urgent focus on early childhood education in the United States and elsewhere is motivated by concern that primary schooling may begin too late to correct cumulative cognitive deficits resulting from family life that does not spontaneously create the prerequisites for further learning.

A second indication of the shift in welfare provision is the growing importance of activation programs: measures that provide inducements and services to those who have lost (or never had) jobs and cannot find employment because of lack of skills, or physical or mental disabilities, or advancing age. Programs grew at rates that were difficult to sustain fiscally. At the same time, traditional assumptions about who should be working were challenged by conservative movements hostile to welfare provision, progressive movements insistent that people who want to work should have greater opportunities to do so, and cultural expectations generated by the increasing presence of women, the elderly, and disabled people in the labor force.

Reformers increasingly assume that the only way to make the welfare system economically and politically sustainable is to encourage and support the long-term unemployed, or those at risk of becoming so, to find work. Typically, these programs combine disincentives to moral hazard or shirking (time limits and caps on benefits) with incentives to work (the possibility of combining some continuing benefits with a share of wages earned from part-time employment) as well as bundles of training, healthcare, or family support services as individually needed.

In the Social Security Act programs, the line between workers and nonworkers has broken down. Various work incentives and/or requirements were added

<sup>14</sup> James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003).

to AFDC until the program was redesigned in 1996 as Temporary Assistance to Needy Families. The new program contemplates only short-term assistance while the beneficiary undergoes job preparation and training. The Retirement Insurance program originally offset benefits by earnings, but the offset was cut back and then eliminated. The disability programs, despite their nominal limitation to “permanent and total disability,” have introduced accommodations designed to encourage work. These include continued eligibility during a “trial work period,” and after that, an “extended eligibility period” during which, if the return to work fails, eligibility can be summarily re-established. Recipients receiving Medicare for disability continue to be eligible for several years after a return to work. The “ticket to work” program provides a package of rehabilitation services aimed at enhancing employability. Proposals now under debate would further develop rehabilitation efforts through “a community-based and multidisciplinary approach that would deploy financial assistance, medical care, and rehabilitation and transportation services, among other things, to promote the overall well-being and highest possible functioning of disability beneficiaries.”<sup>15</sup> And although Unemployment Insurance has always been oriented to workers, the New Deal assumption that unemployed workers needed only income support until employment rates recovered through macroeconomic forces has eroded. Training and education programs have developed and expanded to complement income benefits.<sup>16</sup>

Such programs are often controversial because the punitive, cost-cutting, and often stigmatizing measures against moral hazard can dominate provision of support services. But in Europe, where these developments started earlier, there are notable, well-documented successes of service-intensive programs addressed to groups “far from the labor market,” such as workers above the age of fifty with low education levels, long spells of unemployment, and chronic health problems.<sup>17</sup>

<sup>15</sup> Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES* 115, 154–55 (Michael W. Dowdle ed., 2006). The current activation initiatives in the disability program do not seem particularly effective. Mashaw proposed a more ambitious reform in *BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY* (Jerry L. Mashaw & Virginia Reno eds., 1996).

<sup>16</sup> See *THE WORKFORCE INVESTMENT ACT: IMPLEMENTATION, EXPERIENCES, AND EVALUATION FINDINGS* (Douglas Besharov & Phoebe Cottingham eds., 2011).

<sup>17</sup> See Mattias Knuth, *Broken Hierarchies, Quasi-Markets and Supported Networks—A Governance Experiment in the Second Tier of Germany’s Public Employment Service*, 48 *SOC. POL’Y & ADMIN.* 240 (2014).

### B *Post-Bureaucracy: Experimentalist Organization*

The new regime requires organizations responsive to fluidity and diversity. Organizations configured for such responsiveness can be widely observed in the contemporary welfare state. They are central to the recent initiatives in education and welfare oriented to labor-market capacitation. They can also be observed in other public programs not focused on employment, such as child protective services and policing. There are many variants of the revised architecture. The more successful of these organizations involve significant transformation of each of the three elements of the New Deal amalgam of administrative practices.

*Professional Expertise.* Professional judgment in the old paradigm was applied mainly at the top and only exceptionally and discretely at the bottom (for example, medical evaluations in disability), and it was assumed to be substantially ineffable and inarticulable. Expertise in the post-bureaucratic service organization is different. First, complex judgment is viewed as pervasively necessary at the bottom of the organization as well as at the top. The insufficiency of current rules and routines, and possible alternatives to them, are often first manifest at the ground level. Ground-level decision-makers need autonomy and training to make sense of and act on what they encounter.

Second, in the new service architecture, difficult decisions are not made by a lone professional but by an interdisciplinary team. The team will include people with qualifications in multiple fields. In general, the team's parameters will be defined by the problems it addresses rather than by the background of any of its members. For example, in some of the leading child welfare departments, the caseworker's main function is to convene the team, including key members of the child's family, the child herself, a mental health professional, an official of her school with close knowledge of her performance, and so on. It is the team, not the caseworker alone, that establishes and revises treatment plans.<sup>18</sup>

Moreover, the reasoning and the judgments of these teams are expected to be explicit. There is much less deference to ineffable knowledge and credentials than in the past. This is partly a consequence of the multidisciplinary nature of the teams. Since the members do not share a common professional background, they must articulate for each other things that they might have thought unnecessary to explain to colleagues in the same profession.<sup>19</sup> Finally,

<sup>18</sup> Kathleen Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons From Child Welfare*, 34 L. & SOC. INQUIRY 523 (2009).

<sup>19</sup> The move to articulation reflects further changes in attitudes toward expertise. Skepticism toward the presumptions of traditional professional knowledge is widespread. At the same

while professional knowledge was traditionally assumed to be relatively stable, with certification at entry taken as evidence of qualification for the length of a career, professional knowledge is today seen as evolving rapidly. Learning is understood to occur throughout the career.

*Bureaucracy.* Reliance on the autonomy and expertise of frontline decision-makers goes hand in hand with a new understanding of rules and a break with traditional bureaucracy.<sup>20</sup> Post-bureaucracy seeks more flexibility than the traditional understanding of rules allows but more accountability than the low-visibility discretion that shadowed and supported traditional bureaucracy affords.

In the new service organization, rules are comprehensive but rebuttable. All important aspects of practice are governed by explicit rules. This makes it easier for newcomers to learn practice; it permits comparison of practice across sites; and it contributes to accountability by making practice transparent to the public. Frontline workers, however, are instructed not to follow the rules when doing so would frustrate the program's purposes. They cannot exercise this discretion in the shadows. When they depart from a rule, they must signal their departure in a way that triggers review. When the departure is sustained, the rules get rewritten so as to provide explicitly for the contingency that warranted departure.

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

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

time, changes in communications and information technology have increased the capacity to test and develop professional knowledge. Thus, practice in the service professions has become more “evidence-based.” Such practice requires that judgments be formulated in a way that facilitates assessment in the light of experience, and assessment is only possible when premises are explicit.

<sup>20</sup> See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (Grainne de Burca & Joanne Scott eds., 2006).

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

There is a variation on organizational reform that takes a different direction from the one we emphasize. Often referred to in Anglo-American discussion as "new public management," this approach de-emphasizes rules and encourages some initiative in middle management while remaining more tied to traditional bureaucracy than might first appear.<sup>21</sup> Like the bureaucracy against which it reacts, new public management remains a principal-agent model of action: It assumes that the principal or senior official can confidently know what needs to be done and views the chief organizational problem as inducing subordinate agents to execute the plan. Outcome metrics displace rules, but the metrics are still set from the top and seldom adjusted to reflect frontline learning. Instead, there is an emphasis on incentives. Unsurprisingly, large rewards or punishments for success or failure in meeting narrowly defined targets will also create incentives for perverse behavior – for example, "teaching to the test" – when the metrics fail to capture important dimensions of goals. If this variant becomes prevalent, the departure from New Deal bureaucracy in the new regime will be more modest than if the more experimentalist variant comes to dominate.

*Hearings.* Recall that in the New Deal model and still more in the legal liberalism of the Warren Court era, adjudication was conceived as the

<sup>21</sup> See Carol Harlow, *Accountability, New Public Management, and the Problems of the Child Support Agency*, 26 L. & SOC. REV. 150 (1999); Simon Head, *The Grim Threat to British Universities*, NY REV. OF BOOKS, Jan. 13, 2011.

“all-things-considered” corrective to the formal logic of bureaucratic administration. Mashaw was acutely aware of the disjunction between the modes of decision-making. He thought, as we saw, that hearings as conventionally organized – complaint-driven, independent of line administration, and targeted at idiosyncratic error – were unlikely to function as the full equivalent of a day in court. He was likewise skeptical that, even subject to the discipline of quality control, “bureaucratic rationality adequately defines justice” for “people who have concluded from concrete and often bitter and demoralizing experience that they cannot work.”<sup>22</sup> He worried that, without some form of effective participation in decisions concerning them, claimants would not be able to gain cognitive mastery of the substantive issues at stake; nor would they be able to monitor or otherwise sufficiently control proceedings to ensure that the adjudicator “really listens.”<sup>23</sup> As a palliative he proposed that the government furnish claimants with representatives with the same training as claims examiners.

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

In addition, post-bureaucratic administration goes at least some of the way toward meeting the values that Mashaw associated with participation. Because decision-making is typically in teams that include the client, some degree of direct participation is assured. Because decision-making is extended and revised in time – not, as in conventional claims adjudication, once-and-for-all-time – claimants have the opportunity to become familiar with norms that concern them, and to observe who listens and who does not. The multidisciplinary character of the team facilitates both learning and monitoring: in explaining issues to one another, the team members provide clarifications that aid the claimant’s understanding, and to the extent that team members hold one another to account, or simply disagree, they provide openings and support for the claimant’s monitoring of team performance.

To the extent that the new architecture functions well, hearings should play a more marginal role. They should not be the claimant’s first opportunity for

<sup>22</sup> MASHAW, BUREAUCRATIC JUSTICE, *supra* note 11, at 143.

<sup>23</sup> *Id.* at 140

a direct encounter with a respectful professional decision-maker. Moreover, since hearing officers make decisions with the same methodology as the earlier decision-makers, we would have less reason to expect high reversal rates. On the other hand, there is no rationale in the new architecture for the strong institutional divorce of line administration and adjudication. Reversals should be treated as symptoms of potential dysfunctions in line administration, not as responses to idiosyncrasy.

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

The limits of the insurance-based model of welfare provision are increasingly salient in the disability programs of the OECD countries. As workers have exhausted unemployment benefits before finding jobs, increasing numbers have sought refuge in disability claims.<sup>24</sup> The resulting increase in the disability rolls threatens the solvency of many insurance systems. The US system, despite its modest initiatives to encourage and facilitate work, remains largely tied to an understanding that defines disability as the inability to work.<sup>25</sup> By contrast, the Netherlands successfully adopted an activation program that fully integrates income support with rehabilitation and training. The contrasting trajectories of the two systems illustrate the fragility of the traditional model and the feasibility of reform based on customized services.

In the United States, the fraction of the workforce receiving disability benefits had doubled in the decade before the publication of *Bureaucratic Justice*, and it has doubled again since then.<sup>26</sup> There is no indication that this increase reflects changes in the physical condition of working-age adults. On the contrary, the rate of self-reported disability has remained constant at about 10 percent during this period, and there is independent evidence that the health of working-age Americans has, if anything, improved. In fact, disability awards (as in other OECD countries) are now made increasingly to claimants

<sup>24</sup> On the extensive evidence that disability insurance substitutes for unemployment insurance, see Knut Røed, *Active Social Insurance*, 1 IZA JOURNAL OF LABOR POLICY (2012).

<sup>25</sup> Reforms in 1980 and after introduced incentives and services to encourage work, but these efforts were modest compared to those in the Netherlands. As Mashaw put it in *Bureaucratic Justice*, “SSA has not been converted into a comprehensive health and social service agency that can ‘treat’ disabled clients for their multiple health, training, placement, and income security problems.” BUREAUCRATIC JUSTICE, *supra* note 11, at 203. The observation still applies.

<sup>26</sup> Between 1989 and 2009, the share of adults ages 25 to 64 receiving such benefits rose from 2.3 to 4.6 percent. Our account of the recent US experience follows DAVID H. AUTOR & MARK DUGGAN, SUPPORTING WORK: A PROPOSAL FOR MODERNIZING THE US DISABILITY INSURANCE SYSTEM (2010).



suffering from “subjective” or “non-verifiable” disorders, including mental illness and musculoskeletal disorders such as back pain and soft tissue pain. The share of these awards in all disability allowances has been steadily rising, from 27 percent in 1981 to 54 percent in 2011. Because they are intrinsically difficult to verify objectively, the claims are typically denied at the initial determination stage, but are then often awarded at the hearing level. Applicants with these disorders appear to have the greatest potential for ongoing labor force participation. But they, like other beneficiaries, receive little support for re-entering the labor market, and their skills may in any case atrophy while they are awaiting adjudication of their claims. The employment rate of men aged forty to sixty with a self-reported disability declined from 28 percent in 1988 to 16 percent in 2008.

The financial consequences of these developments are grave. As the Social Security disability programs grow, they command an ever-increasing share of the Social Security system budget. In 1989, 10 percent of Social Security expenditures went to Social Security Disability Insurance (SSDI). By 2009, SSDI’s share of total system expenditures was 18 percent. SSDI now spends annually more than it collects from its share of the Social Security payroll tax, and it is projected that the SSDI trust fund will be exhausted decades before the exhaustion of the Social Security retirement trust fund. Since both depend on the same tax base, the financial deterioration of SSDI is a threat to the system as a whole.

The Netherlands faced similar problems in the 1980s. In 1990, 3.4 percent of the country’s GDP went to disability cash benefits. The median share in the OECD countries at the time was 1.4 percent; the US share was 0.6 percent. The Dutch press began to speak of disability claims as “the Dutch disease.” The government’s initial response was a series of benefit cuts, chiefly a reduction of the replacement rate of lost earnings (from 80 to 70 percent), and a less generous method for indexing benefits to the cost of living. These measures reduced expenditures on the program, but had little effect on the share of the labor force receiving disability benefits (which declined from 11 percent to 10 percent between 1985 and 1995).

Two more thoroughgoing reforms produced a turnaround.<sup>27</sup> The first, introduced stepwise beginning in 1994 and completed a decade later, requires employers to finance the first two years of employees’ sickness benefits. This (together with experience rating of disability insurance, which ties the level

<sup>27</sup> Except where otherwise noted our account of the Netherlands relies on T. P. Everhardt & Ph. R. de Jong, *Return to Work After Long Term Sickness: The Role of Employer Based Interventions*, 159 DE ECONOMIST 361 (2011).

of an employer's premiums to the level of her employees' claims) created a strong incentive for employers to provide rehabilitative services and workplace accommodations for impaired workers.

To structure this response, a second reform in 2002 introduced a "Gatekeeper Protocol." Under this protocol an occupational physician first prepares a problem analysis, including an assessment of the medical causes of the patient's difficulties, the extent of functional limitations, and the prognosis for work resumption. The employer and sick employee use this assessment to draft together a return-to-work plan specifying a goal – resumption of current job or start at another one – and steps to achieve it. They jointly appoint a case manager and fix a schedule for evaluating and, if necessary, modifying the plan. The plan binds both parties; each can call the other to account in case of a possible breach. Eventual claims on the public disability insurance system are only admissible if accompanied by a well-documented explanation of the return-to-work plan and why it has not resulted in resumption of work. In 2007, nearly 11 percent of disability claims were rejected, keeping the employer liable for continuing to support the claimant until she returns to work or the failure of a plausible plan is demonstrated.

Together, these reforms have reversed the earlier trends. The entry rate into the disability system has fallen from 1.2 percent of the working-age population (at the time one of the highest rates of the OECD countries) to 0.38 percent in 2008 (below the OECD average for that year), presaging a long-term, relative decline in the size of the disability rolls. Indeed, the share of the Dutch labor force receiving disability benefits already fell from slightly more than 10 percent in 2002 to 8.4 percent in 2007.

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

program, as they are still in the United States. With the help of these rehabilitation services – provided publicly, or privately, through the employer – the chances that a worker who perceived her health as poor before a prolonged absence due to illness or injury will return to work are as great as those of a worker who perceived her health as good before employment was interrupted, but received no service support.<sup>28</sup>

Unfortunately, there are no studies of the organization of these programs. Nonetheless, two developments strongly suggest that provision of healthcare and social services takes on experimentalist features. The first is the diffusion in Dutch discussion of the reform of social services and healthcare of the concept of “meaningful accountability” (*betekenisvolle verantwoording*), understood generally to mean that professionals, and organizations built around them, are given autonomy to respond to particular cases and situations, but are in turn obligated to report results and to pursue continuous improvement. With regard to the provision of child welfare services in Amsterdam, for example, “meaningful accountability” requires that the municipality set only framework goals for teams of service providers, refraining from detailed regulation, while team members are required to participate in peer review of their respective strengths and weaknesses and “methodical discussion of individual cases.”<sup>29</sup>

The second development is the enactment of the Law on Quality, Complaints and Disputes in Care of 2015 (*Wet kwaliteit, klachten en geschillen zorg*), which integrates and extends a number of earlier statutes. It requires care-providing organizations, as part of their obligation to “systematically monitor, control and improve the quality of care,” to collect and register information regarding quality in “such manner that the information is comparable to information of other care providers in the same category.” On the basis of these registries, care-providing organizations are to “systematically test” whether methods of management do indeed lead to “good care,” and, if not, to make adjustments. To ensure that the registries on which these judgments are based are as complete as possible, all employees of care providers must report all “incidents” – (potentially) dangerous or improper behavior, and the use force under any circumstances – and these reports cannot be used as the

<sup>28</sup> Philip de Jong, Theo Veerman, Cathelijne van der Burg & Carlien Schrijvershof, NEDERLAND IS NIET ZIEK MEER [THE NETHERLANDS IS NO LONGER SICK] 146 (2010), a study commissioned by the Stichting Instituut GAK, available at [http://www.kcco.nl/doc/kennisbank/Nederland\\_is\\_niet\\_ziek\\_meer.pdf](http://www.kcco.nl/doc/kennisbank/Nederland_is_niet_ziek_meer.pdf).

<sup>29</sup> GEMEENTE AMSTERDAM, NEDERLANDS JEUGDINSTITUUT, VERTROUWEN EN REKENSCHAP: VISIE OP KWALITEIT EN BETEKENISVOL VERANTWOORDEN OVER KWALITEIT IN DE AMSTERDAMSE ZORG VOOR JEUGD [TRUST AND ACCOUNTABILITY: A VISION OF QUALITY AND MEANINGFUL ACCOUNTABILITY FOR QUALITY IN AMSTERDAM’S CHILD WELFARE] (2013).

basis for sanctions of any kind, except in cases involving the death of a person under care or the use of force.<sup>30</sup>

The developments in the Netherlands away from compensation for employability and toward provision of services to support return to employment, are paralleled in other European countries, most notably the Nordic ones.<sup>31</sup>

### III THE DUE PROCESS IDEAL IN THE SERVICE-BASED REGIME

Mashaw's abiding contribution to the discussion of justice in the welfare state is the idea that administrative due process is often best served by organizational routines intrinsic to administration itself – by “internal” processes, rather than “external” checks by courts or other oversight bodies. This idea is grounded in his deep and prolonged study of the Social Security system and other civil-rights era bureaucracies, and was given most concrete form in *Bureaucratic Justice*. In recent studies of nineteenth-century federal public benefit programs Mashaw finds historical warrant to generalize this view by showing that even absent constitutional and legislative requirements, agencies in effect regulated themselves to meet “familiar notions of fairness.”<sup>32</sup> The whole body of his work thus aims to inhibit the lawyerly reflex that responds to every failure of due process or accountability in administration with measures inspired by the image of courts as the *fons et origo* of justice.

But we have seen that the nature of administrative organization is undergoing profound change, and so too is the “management side” of due process. These changes suggest amendments to two aspects of Mashaw's original, “bureaucratic” conception of procedural due process. What Mashaw called “accuracy” – frontline fidelity to a hierarchically enacted program – has been redefined to include ongoing review of an organization's purposes and strategies, and especially its ability to tailor responses to particular situations. It follows the trade-off Mashaw underscored between efficient administration under general rules and consideration of the individual circumstances of the claimant is less central and less severe in the new regimes.<sup>33</sup>

<sup>30</sup> Wet kwaliteit, klachten en geschillen zorg, 2014, nr. 407, articles 3, 7 & 9, available at <https://zoek.officielebekendmakingen.nl/stb-2015--407.html>.

<sup>31</sup> See, for example, the detailed discussion of a large-scale, Danish return-to-work program in Birgit Aust et al., *Implementation of the Danish Return-to-Work Program: Process Evaluation of a Trial in 21 Danish Municipalities*, 41 SCANDINAVIAN JOURNAL OF WORK, ENVIRONMENT & HEALTH 529 (2015).

<sup>32</sup> JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 309 (2012).

<sup>33</sup> This trade-off is a central theme of Mashaw's *Due Process in the Administrative State* (1985) as well as *Bureaucratic Justice*.

The shift toward post-bureaucratic, experimentalist organizations has changed the nature of error detection and systematic institutional learning in public administration. The increase in uncertainty has meant that error detection is no longer limited to faults of execution. Correction of error may require reformulation of the organization's strategy, not just the correction of departures from it. Moreover, even as the scope of error detection generally extends upwards to strategy, the shift from grants toward individualized service provision in social welfare administration extends its reach downwards into the interstices of ground-level decision-making. Contextualization becomes the touchstone of administrative performance. Successful contextualization depends on determining, within the scope of an administration's jurisdiction, the goals of a particular intervention; so here too open-ended scrutiny of organizational purpose, not accuracy, is the guiding value of error correction.

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

The possibilities are illustrated in the United States in reforms of public schools, policing, and child welfare.<sup>34</sup> In school reform, the No Child Left Behind Act obligated the states to monitor the annual performance of at-risk populations and to establish governance systems for devising and revising strategies to improve school outcomes. Federal administrative initiatives since then have developed and strengthened these themes.<sup>35</sup> The idea that citizens are equally entitled to pedagogic services tailored to their individual needs is prompted by, and takes on concrete meaning through, these changes. It partly complements and partly supplants earlier understandings of equality in education tied to racial desegregation or equality of school financing, and it generalizes an idea previously developed in the context of "special education" but limited to a fraction of struggling students with medical diagnoses. Increasingly, schools are charged with responsibility to help all students improve, and learning obstacles are recognized as varying idiosyncratically among students

<sup>34</sup> See Charles F. Sabel & William H. Simon, *The Duty of Responsible Administration and the Problem of Police Accountability*, 33 *YALE J. ON REG.* 165 (2016).

<sup>35</sup> See Martin Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 *CAL. L. REV.* 565 (2015).

and as tied to medical, social, and psychological problems. In such situations, effective interventions must be substantially customized.<sup>36</sup>

In policing, the most ambitious interventions explicitly reject strategies that assume that nearly all inhabitants in high-crime areas are criminals or associates of criminals (with knowledge of crime that can be disgorged by aggressive tactics) as prone to produce constitutionally risky confrontations. Instead they favor “problem oriented policing,” which strives to focus aggressive intervention on persistently violent people and to develop a repertory of nonconfrontational interventions (for example, environmental redesign) for nonviolent crime and disorder. Such reforms have been mandated in settlements of judicial challenges to systematic police violations of constitutional rights. Even the less ambitious decrees in such cases establish use-of-force reporting and early intervention systems to detect officers with a propensity for misconduct. Such findings can in turn prompt reconsideration of the strategies that shape the officers’ incentives.

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

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

<sup>36</sup> Finland’s widely admired K-12 educational system, the frontrunner in international comparisons, owes much of its success to the emphasis on individual attention and customized services. About 30 percent of students receive “special education” services. See Charles Sabel, AnnaLee Saxenian, Reijo Miettinen, Peer Hull Kristensen & Jarkko Hautamäki, *Individualized Service Provision in the New Welfare State: Lessons from Special Education in Finland* (2011), a report prepared for SITRA.

Today, in view of the change in the nature of administration and the enlarged role of error correction, the right to due process requires not just accurate but responsible administration: Administration is responsible if it can defend its choice of strategy as providing the best available combination of effectiveness and respect for dignity. Such a right to responsible administration is implicit in the public law jurisprudence of the US district courts in institutional reform cases – descendants of the early custodial-care cases that Mashaw presciently identified in *The Management Side of Due Process* as a promising vehicle for the right to good administration. Now, as then, the trigger for intervention is concern for violation of “constitutional rights of a ‘basic decency’ or ‘fundamental fairness’ sort,” usually compounded by persistent neglect of statutory obligations and the repeated failure of attempts at internal administrative reform and of political redress. Now, as then, the court intervenes by asserting jurisdiction over the inculcated institution and requires key stakeholders to agree to a plan of reform acceptable to the court and to report periodically progress toward implementing it.

What has changed, slowly but profoundly, is the nature of the reformed administration contemplated by such plans. Mashaw was struck in the early custodial care cases with the specificity of the remedies: plans for better lighting, for psychological testing for guards, for rehabilitation. Elements of these remedies had affinities with quality control; but often they focused more on micro-managing practices of prescribing outcomes than on establishing methods of error detection and correction. In recent decades the emphasis has shifted in the direction of establishing post-bureaucratic organization, with the forms of extended error detection and correction that induce and support responsible administration. This shift is reflected only implicitly in doctrine. It emerges from the long-term development of ideas of sound administration. But judicial intervention provides an important setting for sustained reform where wary parties can only regain their autonomy by some measure of cooperation with each other.

Current developments then vindicate both Mashaw’s early insight into the importance of “internal” procedural safeguards and his initial conviction that “external” judicial intervention can be crucial to fostering due process from within. Due process in its changing forms can only be achieved if it is built into the management of administration; but administrators today are often unable to build the requisite management without prods and support from outside.

Seen this way, *Goldberg*, read broadly as Mashaw did, as requiring that due process be adjusted to the conditions of those to whom a fair process is due, remains a lodestar. Hopes that the decision would give rise to a “new property” in process rights for the dispossessed have certainly been disappointed, as

Thomas Merrill emphasizes in his contribution to this volume. But in a diffuse and often subliminal way the values of *Goldberg* animate public law institutional reform litigation and settlements between executive oversight bodies and inculcated authorities. The results may not be manifest directly yet as a revolution in administrative law. But they contribute importantly to the transformation of public management from which, Mashaw has taught us, such revolutions spring.