

Book Reviews

A Declaration of Interdependence: The “New Liberalism”

The Conditions of Discretion: Autonomy, Community, Bureaucracy, by Joel F. Handler.* New York, N.Y.: Russell Sage Foundation, 1986. 327 pages. \$27.50.

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Lawyers misunderstand bureaucrats. They suppose that an adversary system in which clients demand “their rights” from recalcitrant public officials will produce beneficial results.¹ They cast the bureaucrat as the “enemy.” In *The Conditions of Discretion: Autonomy, Community, Bureaucracy*,² Professor Handler argues that the adversarial approach is the wrong way to mediate the relationship between the individual and the welfare state. Adversarial procedures designed to resolve particular, self-contained disputes by impartial decisionmakers are unsuited to the long-term, fluid relationships between individuals and government bureaucrats that characterize many public programs.³ These controversies simply cannot be “decided” once and for all by neutral outsiders. In the educational system, for example, students are educated in public institutions for several hours per day over a twelve-year period by people trained as teachers. A student who brings even a successful lawsuit against a school risks making his or her situation worse by antagonizing teachers, locking the

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1. See, e.g., Reich, *The New Property*, 73 YALE L.J. 733 (1964). While some legal scholars continue to endorse an adversarial posture for dispute resolution of all types, see Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), others are currently developing a critique of the adversarial litigation model. The reasons for this critique range from litigation's economic inefficiency, see Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973), to concerns about the effectiveness of litigation in responding to complex human needs, see Comment, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

2. J. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986) [hereinafter by page number].

3. Pp. 2-3, *passim*.

school into a rigid court-mandated judgment, and generating a decision that does not reflect the special nature of the educational process.

I. Handler's Proposal: "Communicative Conflict"

In the light of his claim that the legal rights school of social reform is profoundly unsuited to empowering individuals to deal with public bureaucracies, Professor Handler suggests an alternative. The alternative envisages a mixture of public criticism and cooperation. Bureaucrats call on both outside experts and program beneficiaries and operate under the assumption that the beneficiaries themselves (or their relatives) can provide useful information and assist in the formation of better decisions in individual cases. The bureaucracy encourages clients to participate actively in decisions affecting themselves as individuals and to form "social movement groups" to resolve broader policy issues with the bureaucracy. The goal is *communicative* conflict, not *adversarial* conflict.⁴ In Handler's ideal system, the adversarial process of judicial review would still be available as a last resort. This default system would condition the behavior of bureaucrats engaged in communicative conflict.⁵

While Handler's approach is motivated by a liberal political philosophy that emphasizes the importance of individual autonomy and choice, he recognizes that sharp distinctions between the individual and the state do not (and should not) describe the situation of social welfare program beneficiaries.⁶ An us-versus-them attitude cannot produce good results. The

4. P. 284.

5. One wonders if Handler can actually have it both ways. Decisions made by cooperative, informal processes are unlikely to produce records that can be reviewed easily by courts. The absence of such records might place school officials in a bind. Informal procedures would be permitted by the courts, but if the record were inadequate, the officials themselves might be called to testify. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971) (reviewing court must test administrative decision and its rationale against material in record at time of decision, and if record does not fully disclose factors considered, additional information, including testimony by relevant public officials, may be obtained). Thus one might argue that leaving open the possibility of a formal appeal will undermine the very processes Handler seeks to establish.

While there is certainly something to this argument, it is, I believe, overly pessimistic. After all, in the business world, informal, cooperative interactions are commonplace between contracting parties in spite of the possibility of lawsuits as a last resort. See Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483. As Handler points out, many interactions between people and public officials are simply unsuited to judicial intervention. Pp. 37-40, 142-43; cf. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) (efficient organization of private economic activity requires matching nature of contractual relation to nature of governance system). In such situations, it may be worth sacrificing some formal, but rather empty legal rights in return for procedures that facilitate cooperation and mutual understanding.

6. Liberal political philosophy primarily addresses two main issues: the nature of freedom, and justifications for state power that are consistent with the protection of individual self-determination. See generally B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); J. RAWLS, *A THEORY OF JUSTICE* (1971). Handler identifies freedom with notions of individuality and autonomy. Pp.

social movement groups he envisages do not require total commitment and surrender of individuality. Instead, they are seen as an organized, non-adversarial way for citizens to further common interests in a public program and assure that the services they receive are tailored to their individual needs.

II. An Empirical Example: Special Education in Madison, Wisconsin

Handler develops his ideas through a case study of the special education system in Madison, Wisconsin. He sees this program as a successful effort to involve parents in developing programs for their children while also making use of expert advice from both outside and within the public agency. Parents can deal with the agency directly in establishing an educational plan for their handicapped child or they can use “lay advocates.” These people seek “to aid the parent in understanding what the [school district] is trying to say *and* to help the parents in getting their position across.”⁷ They are not primarily responsible for advocating their client’s legal rights. Instead, the ideal is for them to reach a mutually satisfactory solution in cooperation with school officials. In practice, most students are placed without legal challenge. There have been only three formal appeals since 1973.⁸

In addition, active parent organizations exist, and they apparently have managed to interact with the agency in a setting of communicative conflict without either cooptation or adversarial confrontation. Both parents and school officials seem basically satisfied with the operation of the system, and Madison has become a model for other communities. The problems are the problems of success. Parents trust the agency to act responsibly and so lose interest in direct participation.⁹ One irony of the Madison experience seems to be that because the school system is open to parental input, parents feel no need to defend themselves and their children against the bureaucracy, and hence direct participation “tends to wane as the child grows older.”¹⁰

263–64. He seems to believe, or at least accept, the idea that the role of the state is to assume “responsibility for the workings of the market and the distribution of social and economic benefits.” P. 288. The focus of Handler’s book is the interface between the individual and the state, particularly as it relates to the distribution of social and economic benefits. Pp. 2–3.

7. P. 94 (emphasis in original).

8. P. 110.

9. Pp. 111–13.

10. P. 103.

III. The Limits of Handler's Example

Handler's book, however, cannot properly be billed an in-depth study of special education in Madison. In fact, aside from brief references throughout the book, the Madison experience is allotted only a single chapter. The author apparently interviewed a few people and looked at several reports, pamphlets, and handbooks, but he did not, as he himself admits, carry out a systematic study of the Madison School District's process.¹¹ His aim is "to show what the Madison [s]chool system is trying to do, rather than present an empirical study of whether they are, in fact, accomplishing their purposes."¹² A full-scale empirical evaluation "would be a major effort clearly beyond the scope of this work."¹³ One wonders why. As it stands, the book seems padded. In developing his position, he summarizes his own previous work on juvenile status offenders,¹⁴ spends part of a chapter discussing medical malpractice and "informed consent,"¹⁵ and devotes considerable space to what are essentially literature reviews of work on organizational behavior,¹⁶ social movements,¹⁷ and political philosophy.¹⁸ While it is important to find examples outside special education and to relate the Madison example to broader social themes, these discussions are overly long and lose much of their force because the reader lacks an in-depth understanding of the Madison experience.

The book raises a host of unanswered questions about special education in Madison. How did the Madison system arise in the first place? How does it really operate in practice? For example, what proportion of people use lay advocates? What has the role of voluntary organizations actually been? Do the placements used in Madison differ significantly from the choices made elsewhere? How does the mix of handicaps in Madison differ from that in other school districts? Does Madison's relatively resource-rich program help to diffuse conflict? Does the size of the district matter — that is, is the Madison system unsuited for very large or very small districts? In short, what lessons can be learned by program administrators in large, poor, central city school districts who must serve a population of severely handicapped children?

11. P. 107.

12. P. 95.

13. P. 301.

14. Pp. 183-90 (citing *NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS* (J. Handler & J. Zatz eds. 1982)).

15. Pp. 266-80. He offers "informed consent" as a possible paradigm for the relationship between citizen and bureaucrat.

16. Pp. 193-213.

17. Pp. 227-58.

18. Pp. 121-41, 285-92.

Answers to these questions are important if one wishes to generalize from Handler's study even within the area of special education. While Handler touches on a few of these issues, he provides answers to none of them. A deeper analysis is needed, however, both to understand how the procedures work in practice and to evaluate them not only as ends in themselves but also as ultimately producing better outcomes. The primary purpose of Handler's proposed reforms, after all, is not to make parents feel comfortable about their children's educational placements, but to improve the system by which handicapped people are educated.

IV. Beyond Special Education: The Lessons of Madison

I raise these concerns because I am very sympathetic to Professor Handler's approach which, to my mind, is based on a realistic view of the nature of many social welfare programs and is a useful antidote to a hard line legal rights approach that sees the bureaucracy as a hostile force. One needs, however, to consider whether Handler's proposals generalize to discretionary decisions outside of special education.

First of all, the nature of the relevant expert knowledge in special education limits the applicability of Handler's proposals. In special education expert knowledge exists, but the range of uncertainty both in diagnosis and in recommendations for education is so large that educators may welcome help both from parents and from any experts they choose to bring to the deliberations.¹⁹ In addition, much of the information is not so esoteric as to be beyond the understanding of parents and their lay advocates. In contrast, in medical care (which Handler himself singles out as an area where lay advocacy and client organization have seldom been successful),²⁰ the range of uncertainty, while still substantial, is less and the knowledge more esoteric. Nevertheless, some decisions, such as whether to place an aged person on Medicare and Medicaid in a nursing home or to provide support for home living, seem, in principle, open to the same kind of cooperative decisionmaking as special education placements. Just as in special education, the client and his or her family will have information that can help produce a better decision. Since the bureaucrats need the client's help to do their job effectively, there is room for a mutually beneficial relationship.

Second, in special education the educators must both identify the handi-

19. This practice can only succeed, however, if no sharp ideological or professional conflicts exist. For example, in the mental retardation field, people differ sharply both over whether the mainstreaming of children in regular classrooms is desirable and over how to measure mental retardation. For an exploration of those conflicts, see Rose-Ackerman, *Mental Retardation and Society: The Ethics and Politics of Normalization*, 93 *ETHICS* 81 (1982).

20. Pp. 266-80.

capping condition and design an educational program. Few children will falsely claim to be developmentally disabled. The problem, instead, may be to persuade parents to admit the existence of handicapping conditions. There are two reasons for this. First, in spite of reform efforts on behalf of the handicapped and developmentally disabled, there is still a certain stigma attached to these conditions. Second, the educational programs are not ones that other children are likely to want. If, instead, the school gave longer vacations or daily ice cream pops to those deemed developmentally disabled, the school system might have to deal with cases of fraud.

When we consider other social welfare programs, however, the possibility of unqualified people seeking to qualify must be faced by public officials. In these situations, legalistic determinations of eligibility will be in conflict with the development of cooperative, mutually supportive, long-term relationships between clients and government bureaucrats.

At the opposite extreme from Handler's special education example are Aid to Families with Dependent Children, Social Security disability programs, and worker's compensation, all programs in which officials do little more than decide whether an individual is eligible for a cash payment. Because the subsidy is provided in the infinitely fungible form of money, unqualified people may seek the benefit even if some stigma attaches to being on welfare or being disabled. Thus the basic cooperative presumption behind the Madison program will not apply.

The social programs that produce the most difficult problems for public administrators are, therefore, those that combine benefits attractive to ineligible people with a program requiring an ongoing, cooperative relationship between public officials and clients. Public officials are then torn between the roles of watchdog of the public purse and of sympathetic facilitator. This tension has long been recognized. It produced a reform of the welfare system in the sixties that separated eligibility decisions from the provision of counseling and other services designed to help reduce welfare dependency.²¹ It continues to vex programs providing housing, medical care, day care for children, and psychological counseling.

One seeming solution is to have public agencies simply determine eligibility while private organizations provide services to those found eligible.²² But if the situation of beneficiaries is similar to those in Handler's special education example, this division of responsibilities will not succeed in isolating public officials from programmatic choices. At the very least, they

21. See G. STEINER, *THE STATE OF WELFARE* (1971).

22. For a fuller discussion of this issue in the light of a particular proposal that can resolve this problem in a limited range of circumstances, see Rose-Ackerman, *Social Services and the Market*, 83 *COLUM. L. REV.* 1405 (1983) (discussing strengths and weaknesses of "proxy shopping" as applied to health care, to integrated schooling, and to care of deinstitutionalized mentally retarded).

will need to certify eligible providers and hence must judge the quality of the programs. If the programs are substandard, does the state deny eligibility, thus perhaps depriving some people of service,²³ or do the responsible officials work in an atmosphere of "cooperative conflict" to improve the providers' programs?²⁴ Will the private agencies, on their own, seek to involve beneficiaries and their relatives in planning their programs, or will public bureaucrats avoid a conflict of roles only to produce a system in which private experts dictate to subsidized clients? Obviously, there can be no simple answers to these questions since they depend on the nature of the service, on the knowledgeability of clients, and on the number of private service providers available. In some programs, the federal government has found it necessary to require at least pro forma client involvement. Federal day care regulations, for example, required centers to involve parents in determining center policies and programs, but one cannot tell if this condition produced real parental input or was just window dressing.²⁵

V. Communicative Conflict versus Scarce Resources

In most public policy areas, the most bitter conflicts involve the allocation of scarce resources. Major fights are unlikely if bureaucrats only decide which of several equally costly alternatives to offer a qualified client. Why not, in such a situation, let the client's wishes play a role so long as they fall within the range of the official's professional judgment? This seems to be a rough approximation of the position of the Madison School District. The model of cooperative conflict may be impossible to realize, however, if the fight is over scarce resources. Suppose a parent argues for an expensive private placement for her child, claiming that the public school system has no adequate program. Suppose that such a placement costs \$30,000 per year and reduces the budget available within the district to educate other handicapped children. Even if the district officials believe that the private placement will be marginally better for the child, they may well resist it because of the consequences for the local program. The conflict is between a parent who wants more public resources for her child and district officials who consider the cost this will impose on others. It is

23. See, e.g., *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) (nursing home residents on Medicaid challenged Pennsylvania's decertification of their home as substandard).

24. For a study of the similar issues that arise in health and safety regulation in the workplace, see E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

25. Evidence from one survey found that 75% of all centers had parent advisory councils. The role of parents was much stronger in non-profit than in for-profit centers. C. COELEN, F. GLANTZ & D. CALORE, *DAY CARE CENTERS IN THE U.S.: A NATIONAL PROFILE 1976-1977* 35, 66, 112, 171 (1979).

hard to see how such a conflict can be resolved by cooperative methods. The question ultimately becomes one of a parent's right to insist that public funds be used for her child. Of course, such a conflict might be diffused by the kind of open, consultative process envisaged by Handler. But how is one to tell if this process is a legitimate search for a mutually beneficial educational plan or an attempt to coopt and influence parents before they have a chance to think of demanding the more expensive outside placement option?

Of course, it may in fact be the best use of scarce resources to keep most handicapped students within the public school system. My only point here is that we cannot tell if that is so by simply noting that few people challenge the bureaucracy's placement decisions. That is why information on the actual performance of the system is so important. One cannot convincingly rebut the legal rights advocates without showing both that Madison's procedures did preserve individual dignity and autonomy as well or better than legalistic approaches, and that the system of educating the handicapped that resulted was at least as good as that produced in more antagonistic settings with similar resource constraints.

Conclusion

Handler has not struck a happy balance between theory and practice. His theory is vague, and his report on the Madison experience is brief and superficial. Having identified serious weaknesses in the legal rights approach to social welfare policy, he suggests a plausible alternative based on cooperative conflict that he argues is truer to liberal ideals than more adversarial methods. The reader is left, however, both to question his proposal's underlying justifications and to ask whether Handler's preferred system would operate in practice to enhance the self-respect of participants and to achieve beneficial results.