



1983

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## Recommended Citation

Mashaw, Jerry L., "Mirrored Ambivalence: A Sometimes Curmudgeonly Comment on the Relationship Between Organization Theory and Administrative Law" (1983). *Faculty Scholarship Series*. 1150.  
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# Mirrored Ambivalence: A Sometimes Curmudgeonly Comment on the Relationship between Organization Theory and Administrative Law

Jerry L. Mashaw

I agree with Peter Schuck that we administrative law teachers have much to learn from organization theorists, although (perhaps because) their general perspective often differs from ours. As academic administrative lawyers we tend to be reformers. We attempt to develop institutions and modes of operation that honor administrative law's two fundamental prescriptions: "Be reasonable!" and "Play fair!" Moreover, this prescriptive viewpoint on organizations leads us generally to think of administrative behavior as motivated by the pursuit of various public welfare objectives. We may think that "the public interest" is too vague as a statutory command, but we nevertheless tend to believe that public welfare is the proper objective of public administration.

Much of the social-science literature on organizations is, on the other hand, what I shall call "public choice" rather than "public welfare" oriented. It is concerned with positive theory, or behavioral predictions. And the hypotheses that organizational theorists have developed to predict agency behavior tend to view individuals within bureaus, and bureaus themselves, as pursuing some strategy for maximizing their own utility. The output of the administrative process is then an aggregate of these self-regarding, utility-maximizing actions as shaped or influenced by the particular institutional structures and decision processes of specific bureaucratic settings. Organization theory in its positive pursuits may, therefore, tell administrative lawyers something important both about why our public welfare goals are not always realized and about how we might structure institutions to mold the self-regarding behavior of bureaus and bureaucrats to produce public-regarding or general-welfare-enhancing results.

The stage is thus set for yet another fruitful marriage of law and social science. But, lest this union merely add to the mounting incidence of disappointed expectations and early divorce, we should perhaps look somewhat more carefully at what organization theory has to offer. If we do, I doubt that we will cancel the wedding. We can indeed learn from observing how social

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scientists interested in organizational behavior frame their empirical questions and from reading the rich case-study literature that they generate on the activities of particular organizations. But we may in the process find that, as with any close relationship, the primary value lies in what the interaction teaches us about ourselves.

### The Indeterminacy of Positive Theory

The positive theory of organizations, particularly the literature on public organizations, is highly suggestive, but its empirical results are not really very encouraging. Economists have been particularly successful in developing testable models, models in which objective and determinate inputs and outputs can be correlated. But the reward for their rigor has generally been to increase suspicion of the predictive power of parsimonious economic models. William Niskanen, for example, suggested in an important book that public bureaus act primarily to maximize their budgets through monopolistic sales of goods and services to the relevant congressional committees.<sup>1</sup> A whole series of negative welfare consequences were said to flow from this proposition.

Some evidence has been found for the Niskanen thesis.<sup>2</sup> Indeed, who would have doubted that *some* evidence could be found. Yet the theory has been shown to be deeply flawed,<sup>3</sup> and counterexamples abound in the recollections of all of us: the Social Security Administration battling to avoid the enormous budgetary increases involved in administering the Supplemental Security Income Program; numerous regulatory agencies adopting "efficient" rule-making techniques that economize drastically on direct budgetary expenditures.

Perhaps the most careful testing of a Niskanen-like model is Douglas Arnold's.<sup>4</sup> Building on the Simon-Lindblom school of microeconomics, Arnold hypothesized that bureaus are budget stabilizers first, maximizers second. But Arnold's studies of three programs in which these bureau-congressional trades would seem predictable, because the programmatic expenditures are geographically divisible, revealed that his theory could in the best case explain only 26 percent of the variance in agency budgets. And, of course, there is no reason to imagine that even these modest results could be replicated (if the theory could be tested!) in other types of programs.

I should, of course, note that my constrained enthusiasm when confronted with these results is not always shared by my social-science colleagues. They sometimes profess delight when they get solid variance explanations in empirical tests that creep into the double-digit range. But this is usually not

1. William A. Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine, Atherton, 1971).

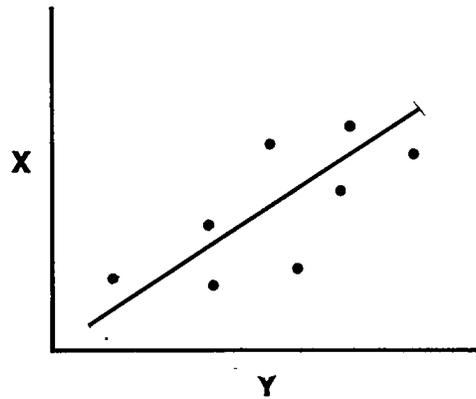
2. See William A. Niskanen, *Bureaucrats and Politicians*, 18 *J. L. & Econ.* 617 (1975).

3. See, e.g., Jean-Luc Migue & Gerard Belanger, *Toward a General Theory of Managerial Discretion*, 17 *Pub. Choice* 27 (1974); Albert Bretan & Ronald Wintrobe, *The Equilibrium Size of a Budget-Maximizing Bureau*, 83 *J. Pol. Econ.* 195 (1975); Julius Margolis, *Comment*, 18 *J. L. & Econ.* 644 (1975).

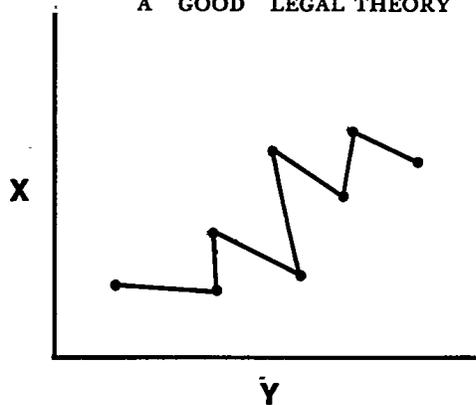
4. Douglas R. Arnold, *Congress and the Bureaucracy* (New Haven: Yale Univ. Press, 1979).

good enough for lawyers trying to predict, in order to mold, the behavior of specific bureaus. The different predictive demands of lawyers and social scientists might be succinctly illustrated by the following two graphs depicting a "good" social-science theory of the relationship between administrative behavior  $x$  and some contingent state of the world  $y$  and a "good" legal theory of the same relationships, tested in relation to the same data.

A "GOOD" SOCIAL-SCIENCE THEORY



A "GOOD" LEGAL THEORY



But do not misunderstand me. We should by no means scoff at the Niskanen and post-Niskanen literature. For one thing, it focuses our attention on congressional-bureau relations as an important determinant of agency behavior; an insight that is hardly novel for a Washington lawyer but that is virtually ignored by administrative law doctrine and scholarship. For another, its limited predictive power might caution us concerning the wisdom of attempting to give a fully determinate shape to administrative behavior through statutory or doctrinal tinkering. As lawyers we are, I think, generally much too fond of attempting to draft a statutory or regulatory solution for every potential oddity in a necessarily evolving administrative

context. Moreover, the Niskanen-style hypothesis, however apparently simple minded, specifies a model with objectively measurable variables. This is a virtue not to be found in virtually any of the other literature on organization theory—even some of the most insightful of the literature attributable to economists.<sup>5</sup>

The organization theory that emerges from the sociological literature, for example, often provides richer contextualization and more intuitively plausible hypotheses. But the price is a rather radical indeterminacy in the interpretation of its empirical findings. Michel Crozier's famous "Power moves to blind spots," for example, may seem apt if "power" means the formal power to *make* decisions.<sup>6</sup> But if we want to predict how organizations will behave, that is, *what* decisions will be made *and how they will be implemented*, it is not at all clear that Crozier's aphorism is more than a curiosity. A fair amount of the literature that Schuck refers to, for example, seems to contradict Crozier by suggesting that the real power to determine the effective output of policy is at the level where information is most readily available. Does this suggest the counterhypothesis "Knowledge is power"? Or does it only suggest that, like "power," the "blind spot" idea is operationally ambiguous. (Blind to or about what?)<sup>7</sup>

Nor have political scientists done any better when it comes to producing either well-specified models or good general predictions. The perennial favorite, the "iron triangle" of interest groups, congressional committees, and bureaucracies, simply cannot explain much of the regulatory (or deregulatory) behavior of the 1970s.<sup>8</sup> Indeed, in the final chapter of "The Politics of Regulation," James Q. Wilson seems to despair of a behavioral hypothesis that will provide parsimonious explanation or prediction. So deep is his perplexity that Wilson makes a suggestion of almost breathtaking naiveté, one that only a Harvard professor secure in his tenure and in his sophistication could have uttered: perhaps behavior follows ideas. Well, perhaps. But how would you prove it? And in the postrealist world, how could anyone entirely believe it?

Again, do not misunderstand me. The literature on organizational theory is not rendered uninteresting by its lack of testable or of empirically successful behavioral hypotheses. As I said earlier, there is much to be learned from its local insights, its "thick description"<sup>9</sup> of the realities of

5. See, e.g., Oliver E. Williamson, *Market and Hierarchies* (New York: Free Press, 1975); Armen A. Alchian & Harold Demsetz, "Production, Information Costs, and Economic Organization," 62 *Am. Econ. Rev.* 777 (1972); Michael C. Jensen & William H. Mecklin, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," 4 *J. Fin. Econ.* 305 (1976) and the literature there cited.

6. Michel Crozier, *The Bureaucratic Phenomenon* (Chicago: Univ. of Chicago Press, 1964).

7. General review, organization, and critique of the sociological literature on organizations may be found in Charles Perrow, *Complex Organizations* (Glenview, Ill.: Scott, Foresman & Co., 1972) and W. Richard Scott, *Rational, Natural and Open Systems* (Englewood Cliffs, N.J.: Prentice Hall, 1981).

8. See, e.g., Michael E. Levine, "Revisionism Revised?: Airline Deregulation and the Public Interest," 44 *Law & Contemp. Probs.* 979 (1981).

9. The phrase is Clifford Geertz's. See *The Interpretation of Cultures* (New York: Basic Books, 1973).

administration. And there are certainly, as Schuck points out, important generalizations to be gleaned from both its approach and its empirical detail. We should not forget that hierarchies are not perfect, that decisions are not isolated events, that environment matters, that organizations have maintenance needs, and that bureaucrats have professional and individual interests and ideologies. But we should also not forget, having remembered these things, that when we are faced with the necessity of attempting to realize in practice one or another of administrative law's normative prescriptions, we still do not have a theory of organizations that tells us how to predict the behavior of bureaus. Social scientific study of organizations can improve, but will not displace, the lawyer's art.

### **Implications for Administrative Law**

One way that organization theory might improve the lawyer's approach to administrative law is by making us legal-institution builders appropriately humble about the state of our own knowledge. For the modest success of positive organization theory suggests an interesting question: How can we know that administrative law has any effect, much less the intended effects, on the behavior of administrative agencies? How can we have a prescriptive administrative law in the face of positive theory's continuing uncertainty about how organizations will respond to all stimuli, including norms purporting to regulate organizational behavior?

There are, of course, a number of ways to answer this question. One way is to deny its relevance. Realists and materialists from Thurmond Arnold<sup>10</sup> to Murray Edelman<sup>11</sup> have viewed administrative law as largely symbolic, a source of societal comfort or an occasion for rage depending upon the observer's disposition. Or following one of Roger Noll's<sup>12</sup> suggestions, we might imagine that administrative law has great regulative power because it reflects the culture of the dominant group in federal administrative agencies—the lawyers. But I am led to a third view—a view in which administrative law has both symbolic and regulative power but in which generalization about behavioral effects is extremely hazardous. Indeed, reflection suggests that this viewpoint is built into contemporary administrative law. For, the ambivalence of administrative law doctrine mirrors the ambivalence of organization theory's lessons concerning the successful design and operation of organizations.

### **The Ambivalence of Normative Prescription**

Let me begin to explain what I mean by mirrored ambivalence at a lofty level of abstraction—a level at which organization theory and administrative law have little more than symbolic significance. Given the indeterminacy of its positive theory we should certainly expect organization theory to be

10. Thurman W. Arnold, *The Symbols of Government* (New Haven: Yale Univ. Press, 1935).

11. Murray Edelman, *The Symbolic Uses of Politics* (Urbana, Ill.: Univ. of Illinois, 1964).

12. Roger G. Noll, *Government Administrative Behavior and Private Sector Response: A Multidisciplinary Survey* (Oct. 1976) (Division of Humanities and Social Sciences, Calif. Inst. of Technology, Social Science Working Paper, No. 62).

modest in its prescriptions. That is, indeed, the case. The currently dominant prescriptive approach is contingency theory,<sup>13</sup> a theory that has two central tenets: (1) there is no best way to design or manage an organization; (2) all ways of designing and managing organizations are not equally good.

Now before administrative lawyers giggle too openly at these principles we should consider for a moment the correspondingly general principles of administrative law. To reformulate the "Play fair!" and "Be reasonable!" prescriptions in more nearly doctrinal terms, I think that those general principles are these: (1) agency processes and structures must respect individual rights to fair and rational treatment; (2) individual substantive and procedural rights are limited by the need to effectuate those public purposes that administrative agencies have in their charge.

Somewhat more concretely, it would appear that many of the more particular precepts or prescriptions of organization theory and of administrative law have a similar quality; that is, the ambivalent prescriptions of one mirror the ambivalent prescriptions of the other. This can perhaps be illustrated by contrasting what I will call the "Weberian" and "micropolitical" views of organizations. Both views are well represented in the literature on organization theory and in the doctrines or practices in administrative law that correspond to, or seem to seek to implement, these quite different ideas of how organizations function.

### **The Weberian Vision**

Max Weber, as we all know, believed that the attraction of bureaucratic organization lay in its capacity for efficient implementation of specified goals. Bureaucratic efficiency flows from a division of labor into discrete tasks that can be mastered at a high level of competence and coordinated through hierarchical supervision. This focus on competence implies that entry into and promotion within bureaucratic service should be based wholly on merit criteria that will enhance the efficiency of the bureau. Similarly, the rules that guide bureaucratic routine will seek to rationalize the behavior of individual bureaucrats and to ensure that particular decisions or actions contribute to the achievement of the bureau's overall purposes. Bureaus are themselves, however, apolitical agents whose purposes or goals are specified by institutions exogenous to the bureaucratic system itself.

Many familiar aspects of administrative law mimic or suggest this Weberian model of bureaucratic rationality. The nondelegation doctrine seeks to preserve exogenous goal creation.<sup>14</sup> The list of the grounds for judicial reversal of agency judgment in the APA,<sup>15</sup> and the actual practices of most reviewing courts,<sup>16</sup> are for the most part celebrations of the law's

13. Jay Galbraith, *Designing Complex Organizations* (Reading, Mass.: Addison-Wesley, 1973).

14. See, e.g., *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (concurring opinion of Justice Rehnquist).

15. 5 U.S.C. § 706.

16. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393 (1981).

demand for means-end rationality in administration. Overtly "political" administrative action is suppressed.<sup>17</sup> Agencies are encouraged, and sometimes required, to develop general rules to guide their personnel,<sup>18</sup> even where lack of particularity might produce some substantive injustice.<sup>19</sup> Deference is paid to agency expertise, and the division of labor that fosters expertness is recognized in the "collegial" decision—formally the decision of the hierarchical superior but substantively the work of specialized staff.<sup>20</sup> The pure spoils system for choosing officials has run afoul of the due process clause's substantive prohibitions,<sup>21</sup> while that provision's procedural requirements foster,<sup>22</sup> even while not directly ensuring,<sup>23</sup> security of bureaucratic tenure.

Now consider the contending vision of organizations. I call this view "micropolitical," perhaps under the influence of Graham Allison's famous Type-III model of governmental decision-making.<sup>24</sup> Others use terms such as "environmental"<sup>25</sup> or "open"<sup>26</sup> to try to capture a series of insights that tend to contradict the basic elements of the Weberian rational-bureaucratic model. In this view, organizations have complex goals and competing internal and external constituencies. Formal authority is largely unrelated to real authority within the organization. Organizations are the tools of some set of internal or external masters, not the neutral implementors of pre-selected programs. At the very least the organization has an internal and an external environment to which it must adapt. Actions are often "ruleless" responses to these conflicting internal and external pressures.

This vision of administration is recognized and fostered by a different set of administrative law doctrines and/or practices. The nondelegation doctrine, as everyone knows, is honored mostly in the breach.<sup>27</sup> Gaps or inconsistencies in agency rationalizations are not necessarily invalidating,<sup>28</sup> and the possibility that the revealed reasons have little relationship to the actual decision process can be inquired into only in exceptional circumstances.<sup>29</sup> Agencies do not have to exercise their rule-making power to produce comprehensive, rational solutions if they would prefer to act in a contextual,

17. See, e.g., *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972).

18. See, e.g., *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir.), cert. denied, 415 U.S. 951 (1974).

19. See, e.g., *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

20. *Morgan v. United States (Morgan II)*, 304 U.S. 1, 17-18 (1938).

21. *Elrod v. Burns*, 427 U.S. 347 (1976).

22. *Perry v. Sinderman*, 408 U.S. 593 (1972).

23. *Board of Regents v. Roth*, 408 U.S. 504 (1972).

24. Graham T. Allison, *Essence of Decision* (Boston: Little, Brown, 1971).

25. Perrow, *supra* note 7.

26. Scott, *supra* note 7.

27. See, e.g., Jerry L. Mashaw & Richard A. Merrill, *Introduction to the American Public Law System 191-94* (St. Paul, Minn.: West Publishing Co., 1975).

28. See, e.g., *Automotive Parts and Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

29. *United States v. Morgan (Morgan IV)*, 313 U.S. 409 (1941).

case-by-case fashion.<sup>30</sup> Prohibitions on ex parte contacts need not inhibit the free flow of executive and congressional political advice.<sup>31</sup> Outsiders with stakes in bureau decisions have and may make claims on agency attention to values far removed from its basic mandate and conventional expertise.<sup>32</sup> The President need not retain high-ranking bureaucrats in whom he does not have confidence,<sup>33</sup> and bureaucratic tenure is, at base, a function of specific statutory or contract provisions.<sup>34</sup>

### The Lesson to Be Learned

The relationship between organization theory and administrative law—what I have described as their “mirrored ambivalence”—might be captured, of course, by any number of alternative conceptions. I make no claim to have been wholly fair to either field and my account is obviously incomplete. But, if the vision that I have propounded is in some sense correct, what lesson should we draw from it? And what might that lesson suggest about the status of the relationship between organization theory and administrative law?

I can certainly imagine a cheerful answer. Organization theorists, while earlier providing the Weberian ideal, are now telling us to remember as we pursue it, that bureaucracy is not all, cannot be all, rational implementation. Designing administrative structures that function acceptably is a much more complex and contingent business than setting out a coherent organization chart. Administrative law has independently (and usually implicitly) recognized the wisdom of this teaching. Legal doctrine mediates pursuit of the Weberian ideal by devices and doctrines that take into account the compromises of political life and the intractable nature of the human materials. Such is the learning of the organization theorists and the wisdom of the lawyers. Although not formally united we are living together both happily and successfully.

But I am not so sure. The notions, (1) that the good is contingent and (2) that local judgment may be informed while global theories are ignorant, do not so comfort me that I can reject a contrary hypothesis. Perhaps neither they (organization theorists) nor we (administrative lawyers) know what we are talking about. That the world still works would then be a testament, not to our learning and wisdom, but to our irrelevance. And, if that is the self-knowledge that we offer each other, I predict an early dissolution of the relationship. Neither we nor they are about to fold up shop, and hence we would be better off going our separate ways.

30. *NLRB v. Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267 (1974).

31. See, e.g., *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977); *Katherine Gibbs Schools v. FTC* 612 F.2d 658 (2d Cir. 1979); Office of Legal Counsel, Department and Justice, Memorandum to the Secretary of Interior, reproduced in part in Jerry L. Mashaw & Richard A. Merrill, 1980 Supplement to Introduction to the American Public Law System 49-50 (1980).

32. See, e.g., *Calvert Cliffs’ Coord. Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

33. As my one-time colleague Carl MacFarland delighted in saying, “The Lesson of Humphrey’s Executor v. United States [(295 U.S. 602 (1935))] is in the title.”

34. *Bishop v. Wood*, 426 U.S. 341 (1976).

There is, as always, a middle way. Neither organization theorists nor administrative lawyers are very happy with the current state of their understanding. Neither of us really wants to say "it all depends" and then provide a shifting list of variables having uncertain weights and relationships to each other as our explanation of what *it* (how organizations will behave or how institutions should be designed) depends on.<sup>35</sup> And neither of us really has much prospect of clearing up our messy theory or our messy doctrine with a single stroke. We will, therefore, continue to confront each other with occasional insights, and occasional insults. We will sometimes wonder whether it is worthwhile listening to each other. Yet as we labor in what Dick Stewart once described as a "dense complexity,"<sup>36</sup> it is nice to know that we are not alone.

35. For a recent instructive attempt to do better see Henry Mintzberg, *The Structuring of Organizations* (Englewood Cliffs, N.J.: Prentice-Hall, 1979).

36. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1813 (1975).