Activism in Perspective

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Professor Mashaw has constructed two models of rights to account for recent developments in American administrative law. I propose to make a few remarks about the "background conditions" of his models in the light of larger shifts in the relationships of law, citizen, and society that characterize our times. Two particular topics are of interest to me. One concerns the nature of the activist state that Professor Mashaw associates with his public law model of rights. The other is the linkage of his public law model not only with a government that assumes managerial tasks, but also with a state apparatus characterized by bureaucratic centralization.

To discuss these themes, I need to place Professor Mashaw's models in a comparative perspective, a perspective that may appear irrelevant to internal American developments. Perhaps some will resent certain implications of expanding the usual framework of reference in talking about the American activist state and the New Deal. But I hope that the scanning of larger horizons will be of some use at least as a rough orientation for internal discourse. As a temporary stay against confusion, even an *ignis fatuus* may be better than no light at all.

I.

Professor Mashaw's two models of law are associated with two types of state: His private law model of rights is related to a state that seeks merely the maintenance of social equilibrium, and his public law model of rights is related to a state that manages economic and social life. But while the former type—the reactive state—can be imagined as a theoretical end-point of a polarity, the same is not true about the latter model—the activist state. As defined by my colleague, the activist state occupies a wide range on a continuum leading from extremes of negligible involvement to extremes of thoroughgoing managerial government. An activist state may leave the allocation of resources to the market and intervene only to correct market imperfections; it may be satisfied only with a few modest welfare programs. Alternatively, an activist government may replace markets by a command economy and attempt to run the state as a giant corporation. From the vantage point of pervasive managerial government, a state with a market economy and a few welfare programs may be

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closer to the reactive than to the activist pole.

One wonders what kind of activist state my colleague has in mind as the background for his public law model of rights: a state that has fulfilled its activist potential or one that is using it sparingly? At first blush, it would seem that the former *has* to be the case: Unless extreme forms of the managerial government are counterposed to the reactive state, a pure form is juxtaposed to a hybrid or mixture, and an analysis of the sort that Professor Mashaw engages in is seriously skewed; employing mixtures in ideal-typical analysis can be like trying to express the finely shaded nuances of *café au lait* or capuccino by referring only to milk but not to coffee. Perhaps, however, one need not envisage extremes of activist state in order to develop an activist model of law. Law springing from activist postures of government may be indifferent to the changing scope of governmental agenda: As managerial concerns of the state expand, the paradigm of law remains unaltered, and only its range of applicability increases. But is this scenario plausible? An answer to this question requires that we consider some fairly obvious features of law in intensely managerial states and compare them to those that characterize Professor Mashaw's public law model.

The central image of law in managerial states is that of decrees spelling out programs and assigning roles. Some of these decrees may accord citizens a share in the common pie and may look like "rights." Citizens, however, cannot always freely assert or waive these advantages as they do rights: If state policy so demands, certain advantages may be forced on citizens even against their will. Suppose a regulation provides that inmates of an institution should be given an hour a day for walking in fresh air. This advantage cannot be waived and officials can compel inmates to spend an hour in the open. If the reference to rights is maintained, rights such as these easily shade into obligations. A decree may specify the right to health care, but at the same time obligate all citizens to take care of their own health, subjecting them to mandatory measures such as inoculations; the duty to go to school becomes the correlate of the right to education. Nor is this commingling perceived as disturbing or anomalous. On the contrary, it may be welcome as a harbinger of a better future in which individuals will be related to one another in more harmonious ways: As their level of consciousness rises, they perform their duties as readily as they exercise their rights. Eventually, as in the *concordia* of knowledge and feeling contemplated by Augustine of Hippo, all alternatives for action other than those a person *should* take may become unattractive; right and duty merge in an indivisible whole.[1]

1. For a recent account of Augustinian *fundatissima fides*, see P. BROWN, AUGUSTINE OF HIPPO

Strictly speaking, then, claims based on decrees of a managerial state are mere parodies of rights. To underscore the contrast with the entitlements of the reactive state, one would do better to say that activist law accords conditional privileges, creates roles, or assigns tasks.[2] This interpretation is consistent with the optimal strategy employed by citizens attempting to benefit from a regulatory scheme: Rather than aggressively asserting rights stemming from the regulation, they insist only that officials observe state decrees, using the weight of the latter, as in jujitsu, to achieve their aims.

Legal relationships between citizens and those in charge of executing state programs are not "horizontal"; officials may even retain coercive powers over citizens involved in disputes with them. The idea of treating state interests, represented by officials, as being on the same plane with individual and group interests belongs to the ideological climate of "reactive," not activist, government. Nor are legal relationships between citizens and officials bipolar in any meaningful sense: Even the narrowest *affaire à deux* can prove to have larger implications in terms of state policy. All those strategically placed for the promotion of state policy can be drawn into the network of regulatory legal relationships. Clearly, then, there is no room for viewing a conflict between officials and citizens as a conflict between two equal parties.

Nor is there any deeper justification for taking such conflicts before the courts. To insist on court enforcement is to assume that judges are neutral conflict-resolvers, indifferent to the implementation of state policy. But this assumption is alien to a truly managerial state: There is no ground for neutrality where state programs are at stake. As in a giant corporation, people are tied together by their efforts to realize state objectives; everybody, including the judges, is expected to be committed to the execution of state programs. *Vae neutris.*[3] As there is thus no "sanctity" to

365-75 (1969). The interpenetration of rights and obligations characterizes Soviet legislation in many areas. *See* FUNDAMENTAL PRINCIPLES OF LEGISLATION OF THE USSR AND UNION REPUBLICS ON PUBLIC HEALTH art. 3 (1979) in 2 COLLECTED LEGISLATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE CONSTITUENT UNION REPUBLICS 3 (W. Butler ed. 1983). And an argument reminiscent of the Augustinian *concordia* is frequently encountered in Soviet legal writing. *See* TEORIYA GOSUDARSTVA I PRAVA 652-53 (N. Aleksandrov 2d ed. 1974); TEORIYA GOSUDARSTVA I PRAVA 460-62 (A. Vasil'ev ed. 1977).

2. For a similar view, see Kamenka & Tay, *Beyond the French Revolution: Communist Socialism and the Concept of Law*, 21 U. TORONTO L.J. 109, 135 (1971); *see also* 2 M. WEBER, ECONOMY AND SOCIETY 642 (G. Roth & C. Wittich eds. 1968) ("public rights" may well be mere "reflexes" of state regulations); Coing, *Signification de la Notion de Droit Subjectif*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 6, 13-14 (1964) (drawing distinction between "true" rights and "rights-functions").

3. This view is reflected in systems patterned on the Soviet model; judicial independence is not understood as independence from governmental policies and causes. *See* LAW ON COURT ORGANISATION OF THE RSFSR art. 3 (1960) in SOVIET CRIMINAL LAW AND PROCEDURE 429 (H. Berman ed. 1966). For a standard presentation of Soviet conceptions of judicial independence, see T. DOBROVOLSKAIA, PRINTSIPY SOVETSKOGO UGOLOVNOGO PROTSESSA 164 (1971).

invoking the judicial process, citizens who feel disadvantaged by official action complain instead to higher-ups or to specialized officials supposed to be "guardians" of regulations.[4] And administrators enforce regulations directly, rather than by suing citizens in court.

Even this most fragmentary sketch[5] suffices as a contrast to Professor Mashaw's public model of rights. Unquestionably, the latter reveals a kinship to the paradigm of managerial law, but it also incorporates many features and assumptions that belong to the ideology of reactive government. Law seems primarily a vehicle for the allocation of rights, even if these rights are weakened by the requirement that they derive from state policy. (In other words, law is easily convertible into rights.) Legal relations continue to be horizontal, even if the subjects of these relationships may be different from those of the private law model of rights. And there is a continuing emphasis (albeit diluted) on court enforcement. Finally, if you reflect for a moment on the vision of society underlying the model, it is one that presupposes conflict (rich and poor, black and white) rather than the pursuit of common goals. All this, of course, will come as no surprise: My colleague conceptualizes against the background of the contemporary American state, in which political and legal sensibilities are still powerfully influenced by notions of reactive government.[6] Mixtures and hybrids thus characterize the legal landscape.

If there is a price to be paid for the resulting impurity of Professor Mashaw's model, it may be its diminished capacity to account for further change in the direction of the managerial paradigm of law. In fact, there may be areas of administrative law in which the *ritardando* of the public law model is already in evidence: In the case of toxic waste regulations or price controls, for example, it may already be more appropriate to talk

4. While a reactive state may teem with lawyers, managerial states bristle with such "guardians" and supervisors. For an early example of such guardians of regulations, consider the *Fiskalat* in absolutist Prussia. E. SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE 180-81 (3d ed. 1965). The Prussian *Fiskalat*, the eye and the ear of the ruler, is—in complicated ways—the forefather of the contemporary Soviet *Prokurator*, "the guardian" (*blustitel'*) of Soviet "legality."

5. An important feature of activist law not even considered here is its flexibility: Law cannot be permitted to stand as an obstacle to the realization of state purposes. Rather, it is contingently related to these purposes and must be modified whenever ineffective or counterproductive. Legal reasoning "abstracted" from its implications on state policy is a dangerous "fetishism."

6. Until the recent trend toward an increased role of government in all Western capitalist countries, it was often remarked that government in the English tradition was characterized by the *relative* paucity of managerial functions. While continental absolutism tirelessly expanded state concerns, from army, to education, to welfare, England and America continued to rely to a far greater extent on various nongovernmental mechanisms for the fulfillment of social needs. The feasibility of such restricted statism perplexed and was variously explained by foreigners. The most fashionable theory attributes the relative unimportance of the state to the allegedly greater success in Anglo-American states, especially in America, of capitalist markets and of the "self-regulating" society organized around them. For speculations on reasons for this greater success, see N. POULANTZAS, POUVOIR POLITIQUE ET CLASSES SOCIALES DE L'ÉTAT CAPITALISTE 182-87 (1968).

about the assignment of "tasks" or "roles" rather than of substantive rights.

I realize that the development of a purer version of activist law may appear repugnant because it conjures up the specter of a totalitarian state. But totalitarianism need not be an inevitable end-result of the expansion of governmental agenda. And in a historical period in which it is increasingly important to locate intermediate positions between autonomy and direction, it may be useful (or sobering) to develop conceptual schemes that reveal the unpleasant extremes not only of reactive government but also of activist government. Like all good things, an activist government can be loved too much or unwisely.

II.

Professor Mashaw's public law model is supported not only by a state that assumes managerial roles, but also by a centralized and bureaucratic apparatus of authority. Conversely, the private law model is supported both by a reactive state and a decentralized officialdom. This joinder of state function and structure as background conditions for the models of law is justified on two grounds. The first, at least insofar as the American experience is concerned, is historical: The rise of the American activist state was accompanied by the rise of federal bureaucracy. The other ground is analytical: The particular combinations of function and structure seem to be a good "match." Consider the activist state. Are not utilitarian orientations best served by a central decisionmaker? Indeed, state programs can be implemented more efficiently by professionals marching to the beat of a single drum than by decentralized amateurs.

I have several reservations about typologies in which aspects of law related to state functions are merged with those related to the structure of the apparatus of authority. These reservations stem from the different implications for the legal system of hierarchical bureaucracies and decentralized lay authority. It will not be disputed, I hope, that coordinate lay authority tolerates greater discretion in decisionmaking than does hierarchical bureaucracy, at least in the weak sense of discretion as absence of superior review. It seems equally obvious that coordinate structures fragment authority and fuse functions, while hierarchical bureaucracies tend to fuse authority and separate functions. Furthermore, the weight of individualized justice—when in conflict with cross-case consistency in decisionmaking—is not equally assessed in the two settings of authority: While coordinate officials are particularly sensitive to the "equities" of cases, hierarchically organized bureaucrats place greater emphasis on consistency and regularity of decisionmaking. And the tendency of professionals to draw sharp, technical distinctions is alien to amateur generalists.

With these implications in mind, imagine an activist state ruled by decentralized amateur officials—a situation reminiscent of Iran governed by the mullahs. Through the lens of hierarchical bureaucracy, the legal system will be characterized by a great deal of discretionary decisionmaking, by an emphasis on "justice," and by little differentiation of functions. But why should these features be attributed to an individualistic or private paradigm of law, contaminating the "purity" of public law in an activist state? Coordinate lay authority can exhibit strong collectivistic impulses; it can be more communal than individualistic.[7] In fact, its style of decisionmaking can thwart the easy assertion of private rights: The limits of freedom and autonomy cannot clearly be discerned in the *chiaroscuro* of official discretion. It is therefore clear that authority structures are not necessarily dependent upon whether the underlying legal model is predominantly public or private.

But this is only part of the story. If you associate public law with bureaucratic and private law with lay authority, a question arises as to which type of authority provides the controlling perspective. The distinction between public and private is not the same in the two institutional frameworks. While lay authority deals indiscriminately with things private and public, it is a hallmark of bureaucracies to "splinter the soul" and keep the private and public realms strictly apart.[8] By making so much of this dichotomy, Professor Mashaw appears to have tacitly accepted the bureaucratic viewpoint. And while this "bias" is not fatal to his scheme, it surely calls for a justification.[9]

There is yet another misgiving: To one seeking to express typical patterns of American legal developments in a broader comparative context, the association of state activism with bureaucratic centralization is quite regrettable. To an internal vision, or to the eye examining itself, the

7. More generally, my colleague's background conditions for an individualistic or private law model often evoke the setting of an organic community (*Gemeinschaft*) more than they do the setting of an individualistic civil society (*Gesellschaft*). For example, in Professor Mashaw's scheme the paradigm of individualistic law is not contract (as one would normally expect) but rather custom. On Tönnies' distinction between *Gemeinschaft* and *Gesellschaft*, see 1 M. WEBER, ECONOMY AND SOCIETY 40-43 (G. Roth & C. Wittach eds. 1968).

There are ways of explaining this wavering, but the full argument would take us far beyond the scope of this Comment. Yet, some glimpses about the reasons for Professor Mashaw's difficulty will become apparent as we discuss the manner in which he commingles the functions and structure of the state.

8. On the separation of the office from the incumbent in the formative years of classical continental bureaucracies, see K. NÖRR, ZUR STELLUNG DES RICHTERS IM GELEHRTEN PROZESS DER FRÜHZEIT 43, 71 (1967). Long before Max Weber, different perceptions of private and public spheres by bureaucratic and non-bureaucratic officials were a recurrent theme in Hegel's writings. *See* S. AVINERI, HEGEL'S THEORY OF THE MODERN STATE 50-51 (1972).

9. Max Weber was confronted with a similar problem in justifying the primacy of the bureaucratic optic. But he recognized the problems and attempted to justify his "rationalist" bias. *See* A. KRONMAN, MAX WEBER 52-54 (1983).

American activist state, of course, is inseparable from bureaucratic centralization. To an external observer, however, one of the most striking facets of the American variant of state activism is that the state apparatus, while increasingly bureaucratized, continues to be permeated by features attributable to coordinate lay authority. These surviving features are more pronounced than in any other contemporary industrial state, and they seem to account for many perplexing characteristics of the political and legal systems. In support of this robust contention, consider the impressions of foreign visitors exposed to the American variant of state activism.

At a most general level, they wonder about the compatibility of activist impulses with an apparatus of government with so many overlapping power centers. These *freins et contrepoids* seem an example of a mismatch between state function and state structure likely to produce more animated standstills than vigorous action.[10] This impression is reinforced by the lingering political ethos according to which amateurism in government is good and state bureaucracies an evil force.[11] Bureaucratization in government will be noticed by foreign observers, but is apt to be assessed by them as comparatively modest. Official positions are frequently temporary or ad hoc, with careers alternating between private and public employment. Striking is the relative absence of bureaucratic exclusivity, so that many functions are readily shared by or even completely transferred to outside amateurs, or nongovernmental specialists. The reliance on outsiders for the enforcement of state programs, even if it causes redundancies or haphazard implementation, is "pre-bureaucratic" in light of bureaucratic tendencies to monopolize action. Quite surprisingly, to orthodox bureaucratic tastes, functions in American government are often fused and distinctions blurred. Federal judges, for example, conjoin administrative, legislative, and judicial functions to a degree likely to drive Montesquieuans into despair.[12] Most astonishing, perhaps, is the continuing decentralization and the concomitant mild hierarchization of authority: In lieu of taller governmental structures, one finds a multitude of feuding small bureaucracies that pursue few common policies. Frequently they are grafted upon preexisting nonprofessional power centers, locked into adver-

10. Those of structuralist persuasion are likely to talk about a *décalage* (or discrepancy) between state functions and state organization. *See* N. POULANTZAS, *supra* note 6, at 166-67.

11. *See* Huntington, *Paradigms of American Politics: Beyond the One, the Two, and the Many*, 89 POL. SCI. Q. 1, 20-22 (1974).

12. Private attorneys general combine—in a typical "coordinate" style—both public and private functions. Discovery devices in civil proceedings are hardly differentiated when it comes to "public interest" or to private litigation. The criminal process is often interpreted as a "conflict-solving" enterprise rather than an instance of criminal policy enforcement. From the continental perspective, Anglo-American administrative and judicial proceedings are insufficiently distinguished. For a comparative perspective, see M. TARUFFO, IL PROCESSOR CIVILE "ADVERSARY" NELL' ESPERIENZA AMERICANA 207 n.29 (1979). And one could easily go on.

sary relationships.[13] It would thus seem that old impressions by observers like de Tocqueville or Marx on the weakness of the state and the "gap" in the executive have survived changes adopted in the aftermath of the New Deal.[14]

What lesson does this larger perspective teach one who intends to engage in ideal-typical analysis of law? If one is to characterize American legal developments, features of law attributable to state functions and those attributable to the modalities of the state apparatus should be kept apart. The paradigm of activist law, abstracting from features related to state *functions*, can then be employed in combination with two different models of authority structure, abstracting from features related to the *structure* of the apparatus of government. Much as the actual functions of the American state are a mixture of activist and reactive concerns, so the actual American authority structure is a mixture of bureaucratic and pre-bureaucratic forms.

But you might object, since Professor Mashaw is not doing comparative law, his conjoining of state activism and bureaucracy may be justified. After all, models should account for developing trends. If they are abstractions from snapshots of the present moment, they cannot account for the future and may be quickly overtaken by reality. Faced with overpopulation, increasing interdependence, the sheer scale of problems, and many other consequences of technological advance, will not an activist state inevitably develop into a centralized bureaucracy? Arguably, then, it is quite proper to conjoin state activism and bureaucratization as background conditions for the paradigm of public law.

Be this as it may, I still prefer a conceptual scheme in which the apparatus of the activist state can be studied as a mixture of hierarchical and coordinate elements. And while the intrusion of coordinate features may impede the efficiency of the governmental machinery, it can also impede the movement toward technocratic totalitarianism. Coordinate authority, as an alternative model to bureaucratic structures, can assist one in better expressing and perhaps better balancing the tensions between democracy and bureaucracy, human autonomy and state direction—all tensions that are likely to intensify in the future. That there is nothing inevitable in the move toward a technocratic Leviathan is at least the hope of those who

13. A good example is the possibility of adversary clashes between public prosecutors and public defenders, both paid by the state. Also surprising to continentals is the scheme of legal aid, which—although funded centrally—is run locally without over-all uniform objectives.

14. It would be more tiresome than instructive to refer to passages from de Tocqueville. It is less widely known that, concerning nineteenth-century America, Marx wrote that the machinery of government was reduced to the very minimum possible in "bourgeois" society. *See* 3 AUS DEM LITERARISCHEN NACHLASS VON KARL MARX, FRIEDRICH ENGELS UND FERDINAND LASSALE 438 (F. Mehring ed. 1902).

have experienced the marriage of red tape and red rule. It is especially the hope of this commentator who has lived through the struggle between "self-managing" and "statist" strands in Yugoslav socialism. But this is not a story for a night devoted to ideal-typical analysis. For it is hard for me to speak with Weberian dispassion about loves I have lost.