

## COMMENTARY ON MASHAW: PROCESS AND PSYCHOLOGY

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Professor Mashaw's article presents a commentator with several difficulties. A great deal of thought is compressed into a short space, sometimes more by allusion than direct treatment; for instance, the reference to liberal democracy. A commentator might, therefore, be tempted to deliver remarks longer than the original article. I am going to resist that temptation. Moreover, even if I were competent to do so, it would be churlish of me to launch into criticism, because I have learned so much from Mashaw's writings on due process. Instead, I want to carry forward his discussion of due process.

Fortunately, two words in his title give scope for this commentary: the words "process" and "psychology." The thrust of his article is double-pronged. First, he wants to reject a certain approach to administrative due process, namely, positivism. Second, he wants to propose a different approach in its place, namely, constrained natural rights. His article, however, is sparse on the relation between psychology and process as such, and it is this topic that I shall pursue in my comments. I do not know how much weight Mashaw intends to put on the term "psychology" in the due process context. It is intriguing that in his book *Due Process and the Administrative State*,<sup>1</sup> Mashaw denies a concern with psychology, with what processes make individuals *feel* dignified or have self-respect. He asserts, rather, that his analysis is concerned with human values as political ideals. Dignity, he writes, is "a particular *political* definition of personhood or citizenship."<sup>2</sup> Perhaps very little hangs on the term, in the end. But it gives me a way into the ongoing discussion of due process.

Before turning to this task, it will be useful to begin with a brief statement of Mashaw's argument against positivist due process methodology. The problem starts with the words of the fifth and fourteenth amendments: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .,"<sup>3</sup> and "No State

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1. J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

2. *Id.* at 171.

3. U.S. CONST. amend. V.

shall . . . deprive any person of life, liberty, or property without due process of law . . . ."<sup>4</sup> According to many judges and constitutional theorists alike, the individual has no freestanding constitutional right to due process, but such a right must be triggered by a prior interest in life, liberty, or property against which the state is adversely proceeding. In the instances of life and liberty, it generally is easy to identify the threatened deprivations that trigger a due process requirement.

In the case of property, however, matters are more complicated. What is a property interest? What is a substantive property right for which the procedural protections of the Constitution apply? These questions are especially pertinent in an "administrative state," which dispenses all sorts of valuable bounty such as licenses, franchises, benefits, and employments. Do welfare benefits qualify as a property interest that raises due process concerns? Does a job with a state or federal agency qualify?

Professor Mashaw rejects the "positivist" way of handling these questions. The positivist approach is epitomized by the general principle of *Board of Regents v. Roth*,<sup>5</sup> which states that while "[p]roperty interests, of course, are not created by the Constitution . . . [they nevertheless] . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."<sup>6</sup> A legislative grant of a substantive right, therefore, is conditioned and limited by the statutorily specified procedures for determining that right. Mashaw agrees with Justice Rehnquist that the majority in *Cleveland Board of Education v. Loudermill*<sup>7</sup> took back with one hand what it gave with the other;<sup>8</sup> it reaffirmed *Roth*, yet read the Ohio statute as if it established an unconditioned substantive right.<sup>9</sup> Such a jurisprudence of due process, according to Mashaw, can only lead to incoherence, because it makes procedural protections a function of the way statutes are drafted. The positivist approach, he also asserts, has led to a bizarre collection of protectable property interests.

These points are sufficient to inspire a search for a different due process methodology. But for a more basic consideration, Mashaw

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4. U.S. CONST. amend XIV.

5. 408 U.S. 564 (1971).

6. *Id.* at 577.

7. 105 S. Ct. 1487 (1985).

8. *Id.* at 1503 (Rehnquist, J., dissenting).

9. *Id.* at 1492-93.

regards the positivist approach as inadequate: it is unable to address the problems of governmental or bureaucratic arbitrariness that the due process clause was meant to address. In its stead he would put his constrained natural rights approach. One important point of distinction is that the latter approach does not require a prior identification of constitutionally protected interests for its application, although it is hardly divorced from the individual's interest in autonomy, self-respect, and equality. It is by this distinction that the due process idea (or ideal) gives rise to a freestanding constitutional right of due process concerning the dealings of the administrative state with the individual.

This natural, constitutional right is not derived from abstract speculations by Mashaw, but rather from the meaning of citizenship in a liberal democracy. As such, it appears to be particularly connected to the fourteenth amendment. Why not, then, embed it in the privileges and immunities clause, which applies to citizens? (How does Mashaw's explication work for the due process clause of the fifth amendment, which presumably applies to all persons?) The right is, of course, a right not to be treated arbitrarily, but as such it is not merely formal or contentless, as some might think. To put it in positive terms, it is a right to fundamental fairness from government as known in a liberal democracy. Its dimensions are those of respect for privacy, rationality or comprehensibility, and preservation of a form of equal participation in governance. While the boundaries of these dimensions are not always clear, they define the process that is "due" the citizen. It is less expansive than one might suppose. In his account of how he would deal with the appellant's claim in *Loudermill*,<sup>10</sup> Mashaw shows how constrained the natural, constitutional right of due process is.

It should be noted that the due process idea is much broader and richer than that of according fundamental fairness, and respect for individual moral agency, to the citizen when the state proceeds adversely against him. Query: Does Mashaw's analysis apply when the state proceeds against an organized group or corporation; e.g., a university? Due process also has to do with how laws and rules are made and how programs are set up. But this subject, on which Mashaw has written elsewhere, is not centrally at issue here. The focus is the narrower one of determining the process that is due the individual in the situation of a conflict between more particularized claims.

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10. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 435, 439-43 (1987).

I now want to turn to this kind of situation. I want to broaden the context of the discussion of "due process" beyond the dual confines of the constitutional (or even subconstitutional) question and disputes between the individual and the state. My aim, as stated earlier, is to continue the discussion initiated by Professor Mashaw.

I propose briefly to note six familiar model situations, each representing an ideal type, in which a third party is called upon to resolve a conflict between individuals. In each situation there seems to be a requirement of due process. The third party, the dispute-settler, is normally expected to deal with the disputants, the parties in conflict, in a neutral and fair manner. The situations mentioned do not exhaust the possibilities even within the terms set forth. And while they are in some respects quite remote from Mashaw's concern with the administrative state, they shed light on some psychological aspects of his dignitary theory of due process. But I, too, do not mean to put too much weight on the term; "psycho-social" might be a more appropriate word, though it is a bit of jargon that is better avoided.

In my discussion I will tolerate a degree of haziness in the line drawn between dispute settlement and conflict resolution. The former, arguably, is a subspecies of the latter, and both are related to, yet distinguishable from, the management of conflict. In the Second World War all nations with submarine fleets hit upon the same solution for lessening conflict among crewmen — unlimited access to food. This is not the sort of thing I have in mind. I am concerned with processes that involve the third party with the disputants in arriving at a settlement or resolution.

The six model situations are (1) civil adjudication, (2) (labor) grievance arbitration, (3) commercial arbitration, (4) labor mediation, (5) marriage counseling, and (6) intensive family therapy. In many ways these situations constitute a continuum, but they fall into two groups: the first three are forms of adjudication, and the second three are forms of, what may be called, conciliation. The adjudicator renders a decision that settles the dispute with finality, while the conciliator assists the parties in reaching their own resolution of the conflict. I am speaking, of course, in ideal-type terms; I am not sure my characterization completely applies, for instance, to intensive family therapy, whose workings are a mystery to me.

Many differences are possible among these model situations. Civil adjudication, for example, is conducted under a regime of impersonal rules, rules that were not designed for the particular parties. Grievance arbitration, on the other hand, is conducted within terms laid down in the negotiated collective bargaining agreement. The commercial arbitrator has some expertise in the subject matter of the dispute and applies industry standards or practices in arriving at a decision.

The labor mediator also may have expertise of this sort, but perhaps more important is his expertise in human relations. The marriage counselor also needs this latter expertise, but his aim usually is to arrive at a "behavioral" solution to the conflict, so the parties are able to "cope" with their circumstances. The family therapist, on the other hand, aims at the "psychic integration" of the parties. Obviously, many qualifications are overlooked in this account. What is vital, however, is that in all of these model situations, and the types they represent, the third party is expected to be neutral and fair to the parties. There is a process that is "due" them, aside from employment of the techniques that are special to the particular model. But are the process and techniques separable? I would suggest they are not. Although there is a requirement of fairness and neutrality that pervades the model situations, the criteria of neutrality and fairness are context-relative.

Certain conditions must be met to successfully adjudicate or conciliate a dispute or conflict. Before I turn to this issue, there is an important question waiting to be asked, though I will not be able to answer it fully here.

To what kinds of dispute or conflict is one or the other of the six model situations, taken now as representing six different *general* forms of processes, most appropriate? Intertwined with this question is another: In what kind of relationship do the parties stand? Human relationships run the gamut from near to distant, affectionate to impersonal to antagonistic, short-term to long-term, and so on, in various degrees and combinations. Any configuration of these elements may be thought of as defining a form of community, even "moral community," that imposes on its members certain moral relations and requirements that may be different in kind from those of another form of community. Put in different terms, the members of a particular type of moral community may also be regarded as standing in one or another kind of "political" relationship. The important point is that the social psychology of human relations is morally relevant. Also relevant is the appropriateness of the different processes to disputes and conflicts.

Since I cannot go into the details of all the permutations and combinations, I shall use a story to illustrate some considerations. The story, reported in *The New York Times* a few years ago, will enable me also to deal with at least a piece of the issue of the conditions of successful dispute settlement and, eventually, to get back to Professor Mashaw's presentation.

Mrs. Isaura Vela of Muskegon, Michigan, had a garage sale to unload some household junk. One item, a painting tagged at five dollars, had no takers. Mrs. Vela had the picture appraised, and found it had been painted by the seventeenth century master Guido Reni. She then

sold it for \$600,000. The report goes on as follows: "The browsers at Mrs. Vela's garage sale must have kicked themselves, but not as hard as her sister and brother-in-law did. It was they who had given her the painting salvaged from a religious center that closed. They sued, claiming half the profits, and today they lost their case." One of the lawyers characterized the case as a tragedy, because the families were torn apart: "The money they gained or lost is not worth losing the relationship they had." Here, then, is the settlement of a dispute that actually exacerbated conflict. What happened here?

It should be noted, first, that there were two conflicts present, only one of which was settled by the judge, the impartial third party. The family conflict, as far as the adjudicator was concerned, was *superseded* by a new conflict, which was formulated in terms of conflicting claims of rights. In presenting their conflict to the court, the parties entered into a new relationship, different from their original family relationship, where the adjudicator could ignore the various particularities of the parties and any desire they may have had to maintain a familial, affectionate relationship in the long term. I would characterize this new relationship as a kind of "strangerhood," which, as paradoxical as it sounds, is an important form of moral community because rights-discourse has its natural home in the strangerhood relationship. Insofar as the resolution of the issue depended on conflicting factual claims, the process — the hearing — plainly had to be concerned with their accurate determination.

It is more important for our purposes, however, to notice that for the new conflict to have been settled with finality, a prior "joinder of issue" had to obtain. That is to say, one party had to deny what the other party asserted, and among other conflicting propositions were the conflicting claims of rights between which the *Vela* judge ultimately decided. In a sense, the conflict between the parties had to be transformed into a conflict of words; i.e., a dispute. Joinder of issue is a *logical precondition* of the three adjudicative model situations enumerated earlier. In all these situations the parties stand in the strangerhood relationship to some degree. For purposes of adjudication, the third party must view the conflicting parties as strangers. This view of them promotes his detachment and impartiality.

Joinder of issue is not a precondition of the conciliational forms of resolution. Obviously, there must be a conflict to resolve, and it is of a much more complicated nature, too complicated for discussion here. Often, it will be the job of the third party to discover what the conflict is, its roots, and its extent. If the parties are seeking to maintain or achieve a long-term, cooperative relationship, the conciliator cannot ignore their various characteristics in the way that an adjudicator is able to. In a labor mediation, for instance, the conciliator must ap-

preciate the relative bargaining power of the parties. Finally, the language of rights is less appropriate to conflicts submitted to conciliation than to adjudication; in fact it may not be appropriate at all. Labor mediators often claim it is impossible to mediate a conflict where the parties insist on standing on their rights. We can imagine the Vela family submitting its conflict to a process represented by any of the three forms of conciliation. Even if Mrs. Vela were to end up with the \$600,000, the scenarios would be different from that of the court case. But I shall not try to write them here.

What about the process that would be "due" to the parties in the various forms of conciliation, to come closer at last to Professor Mashaw's concerns? A neutral, impartial, and fair conciliator would be concerned with the "dignitary values": autonomy, self-respect, equality, privacy, rationality, and participation — but in different ways and different degrees in each of the forms. Their value is to some extent context-relative. Privacy, in fact, probably would turn out to be the least important value, as far as his own dealings with the parties go. But he would not be concerned with these values as a matter of the rights of the parties, though he would be concerned with how the parties *feel* about their dignity. As mentioned earlier, rights-discourse does not have its place here. When lovers claim their rights from each other, it is a sign of trouble. I am not suggesting that labor and management constitute an affectionate community; there are, however, similarities to one. Of course, the parties in conflict are in trouble, but rights-talk is something they have to overcome. The conciliator, it might be argued, is in a position different from that of the parties; he is not and should not be a lover of either or both of the parties. While this is true, he is nevertheless drawn into their community. And dignitary process is a function of his technique.

Although the adjudicator is a member of the "community of strangers," together with the parties, he is also a stranger among strangers. The idea that the dignitary values are a matter of rights is not out of place here, at least. Citizenship in a modern liberal democracy, which is so important to Professor Mashaw's thesis, is primarily a relationship among strangers. Perhaps they are friendly strangers. If so, their dignitary feelings could be as important as their dignitary rights.

