

AN ACCIDENTAL CAREER

Jerry L. Mashaw

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I like the title of these talks, *Intellectual Trajectories*, but I am not so sure that it fits a career that I view sometimes as a series of accidents. I'm constantly amused by my students who think that they can plan their careers for thirty or forty years. I suppose some of them actually manage to do that. I didn't. And so, what I'm going to talk about today is a winding path, a stumbling toward engagement with various topics that have occupied me over the last nearly fifty years. Those topics have often involved administrative law, but also a variety of other subjects connected to public administration and public policy.

I grew up in north Louisiana, which is, believe me, not the interesting part of Louisiana. But I went to school in the interesting part, at Tulane in New Orleans, where my B.A. was in philosophy. I enjoyed the Philosophy department, but I was there in the late 1950s and early '60s, a very politically active time in a changing South. I got involved in various civil rights activities. And those efforts led me to think that I wanted to do something other than philosophy. I discovered that whereas in the Philosophy department we were constantly asking, "What is that?," if you went over to the law school and asked that question, somebody would say, "Why do you want to know?" The law school was a much more functional environment, much more oriented to making things happen in the world, and I enjoyed that environment very much.

Those were also the early years of the European integration. So when I obtained a Marshall Scholarship after law school, I decided to go to the University of Edinburgh, where I did a Ph.D. in European governmental studies. My thesis was on the European Court of Justice and its "federalizing" effects on community law. While I was at Edinburgh, Tulane offered me a teaching job and I returned thinking that I was going to do, not administrative law, but European Community law. Tulane Law School was then a faculty of only sixteen people, and as a junior faculty member I taught what they told me to teach. So I went back to discover that I was teaching administrative law, among other things.

Jerry L. Mashaw, Sterling Professor Emeritus of Law and professorial lecturer at Yale Law School, teaches courses on administrative law, social welfare policy, regulation, legislation, and the design of public institutions. While at Yale he has held joint appointments in the School of Management and the Institution for Social and Policy Studies. He formerly taught at Tulane University and the University of Virginia, and has lectured and taught abroad in Europe, Latin America, China, New Zealand, and Australia. Mashaw's most recent prize-winning book is *Creating the Administrative Constitution: The Last 100 Years of American Administrative Law* (2014). He is a frequent contributor to legal and public policy journals and to newspapers and news magazines. He is a founding member and past president of the National Academy of Social Insurance, a fellow of the National Academy of Arts and Sciences, and was founding coeditor of the *Journal of Law, Economics and Organization*. Mashaw has served as a consultant for a number of U.S. government agencies and private foundations and for the governments of Peru, Argentina, and the People's Republic of China.

I had not had administrative law in law school and this may have turned out to be an advantage. I didn't have the biases that normally inhabit the field. The principal bias is that administrative lawyers study what courts say about administrative law, not what agencies do, or the executive branch does, or indeed how these agencies are connected to the legislative branch. But I thought all of those things more informative about how the law really worked than the opinions of courts reviewing administrative action. So I went off in the wrong direction in terms of the central preoccupations of the field. And the trajectory of my scholarship was again shaped by a series of accidents.

The first was a professional mini-crisis. The dean, with the approval of the tenured faculty, fired the most promising young person that we had hired in about two decades. That action convinced me that they were not interested in a first-class faculty. So I resigned. This did not make my wife particularly happy, because we had two small children and I had no job, but things turned out extremely well. I was hired by the University of Virginia, which had a significantly better law school. Once again I was told to teach administrative law, but in the context of a course called "Legislation and Administrative Law." This was, at the time, a novel offering and there were no published course books for it. Hence I had to put together materials of my own, which became my first published book, coedited with my then colleague Richard Merrill. That book, much revised, is now in its seventh edition. It has in many ways anchored my career as primarily an administrative law scholar. But administrative law radiates out into a number of other related substantive fields that I have also pursued over time.

At the University of Virginia, for example, I got involved in forming the Legal Services Corporation for Central Virginia. One of the things we discovered in providing services for low-income people was that the Virginia welfare authorities had some very strange views about welfare administration. Local practices were curious to say the least, many illegal for sure. As a consequence, I began to be interested in exactly why these people thought that what they were doing was lawful. So a group of students and I investigated the practice of five rural counties in central Virginia in giving out welfare benefits under the Aid to Dependent Children Program. We discovered that the important causal factor for much eccentric, and illegal, behavior was an institutional holdover, the County Board of Welfare, which had been created when welfare administration had been wholly a local or state function. The County Boards of Welfare believed, not unreasonably, that they had a job to do, and they thought their job was to make welfare policy. It was just that their welfare policies were inconsistent with what the federal government, which was now the major funding source, said the program was supposed to be about.

We ended up putting several of these programs in receivership and radically reforming their administration. But the important lesson this experience taught me was that to understand how public administrative systems work, it is crucial to investigate law on the ground—what local administration is like, and what the people in charge think it is they are supposed to be doing. That really has formed the basis for a lot of the work that I've done in administrative law ever since. And, as I say, this was in

some sense an accident, a perspective on the field that came out of an activity that was actually extracurricular.

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Because I had done this work on welfare administration, I got a call from a fellow named Milton Carrow in Washington, who ran the ABA Center for Administrative Justice. The center had received a grant from Congress to do a study of benefits adjudication in the disability insurance program under the Social Security Act. Milt Carrow was putting together a research team, and he was looking for people who had some experience studying public benefits programs. In those days such people were pretty thin on the ground. So I got on a plane – Piedmont Airlines, which no longer exists – and on the plane I began to think about what a study of the administration of social security disability benefits should look like. And, literally on the back of a Piedmont Airlines napkin, I wrote down five steps for organizing a study of social security disability adjudication.

I got to the meeting and discovered that nobody else had a napkin. So I ended up being the organizer and leader of the study, which produced a book called *Social Security Hearings and Appeals*. That was a great experience in collaborative scholarship, and the book has had a lasting impact on how people think about mass administrative justice. But I also found it in some ways unsatisfying. Our team was looking at the upper levels of appeals by people who had been denied benefits. But this really was the tip of the iceberg. As you look at the social security disability program, what you find is that something like three million people make applications each year, and almost half of those are granted. So, by simple arithmetic, we have a million and a half people who have been denied. Of those million and a half, four hundred to five hundred thousand take appeals to the hearing process. This means that two and a half million claims have been adjudicated either positively or negatively without getting to the hearings and appeals stage – the stage that my prior study had investigated.

So the question I asked myself was, What's going on down there in the lower levels of the bureaucracy? This led to a book called *Bureaucratic Justice*, which is in part an explanation of those lower levels of the process and in part an account of how accountability can be built into administrative systems by managerial practices rather than judicial controls. That study was enormously illuminating to me, and has been to others, because no other legal scholar had ever looked at ground-level administration in a mass administrative justice program of this scale. It's one of my best-known and most often cited books, in large part I think because that sort of ground-level investigation of how management practices affect legal outcomes is quite rare. It turns out to be hard to do empirical work in large administrative systems. *Bureaucratic Justice* sort of set the tone for a good bit of the research that I've done since.

As these two examples illustrate, if I am known for anything it is essentially for pursuing administrative law from an internal perspective. But, I should say that not all of my work has been of this sort. I've stumbled into other things as well. When I was at the University of Virginia, the University of Rochester started a program called Economics for Law Professors. This program was funded by some conservative

foundations that were trying to indoctrinate law professors with free market principles. But, ideological motives aside, I thought the application of economics to law was extremely interesting, and for a while I thought that I was going to be a part of the law-and-economics movement, which got going in the 1960s and is still very important in the legal academy. Because I was a public law scholar, what really interested me was the application of economics to politics, a field called positive political theory or public choice theory. It also happened that at the University of Virginia, two of the founders of that enterprise, Jim Buchanan, subsequently a Nobel laureate, and his colleague Gordon Tullock, were members of the economics faculty. We formed a study group on positive political theory and public choice, which was made up of people in the Political Science department, the Economics department, the Philosophy department, and the law school. Through that group I got very interested in the application of public choice to law and how in particular it might be applied to administrative law.

This led, many years later, to one of my nonempirical books, *Greed, Chaos, and Governance*, which is about the application of public choice theory to public law. It is in some sense an internal critique of public choice theory and an attempt to suggest the ways in which legal scholars might borrow from it productively rather than unproductively. That book won some nice awards, but it has made me persona non grata in the whole public choice field. I'm never invited to their conferences, and I'm never cited by the partisans of that approach to law. True believers do not take kindly to criticism of their basic methodological premises.

Nor have I wholly abandoned my interest in philosophy. Administrative law is preoccupied with administrative process – in particular, what sorts of hearings must be provided as a matter of due process of law to persons challenging administrative decisions in administrative fora. In *Due Process in the Administrative State* I explore these questions from the perspective of Kantian moral theory. And I am currently finishing up a manuscript with the working title “Reasoned Administration” that explores the idea of reason in administrative law and how that idea connects to theories of both aggregative and deliberative democracy. My contrarian argument there is that, far from being governed by unaccountable bureaucrats, the American administrative state develops public law in a more democratic fashion than either elected legislatures or unelected courts.

I have also done work that is largely policy-analytic rather than legal, philosophical, economic, or empirical. When I came to Yale, in 1976, I was still working on the *Bureaucratic Justice* book and on disability policy. At about that same time the National Academy of Social Insurance was formed. I was invited to be a founding member of that organization and was subsequently its president. The academy is modeled on the National Academy of Arts and Sciences. It holds conferences, does studies for Congress and foundations, provides fellowships for younger scholars, and so on. Through the academy I got interested in the whole field of social insurance and ended up writing three books on social welfare policy with colleagues in law, economics, and political science.

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At this point in this rambling description of my intellectual journey, you can probably see why I think of my career as accidental. My interests have been stimulated by my particular teaching assignments, extracurricular public interest activities, association with multiauthor research projects and subject-matter-specific institutions, and serendipitous forays into related fields. Yet another somewhat random influence has been my association here at Yale with the Institution for Social and Policy Studies and, in particular, its onetime Center for Health Policy Studies.

My association with the center was quite unexpected. Ted Marmor, the director of the center, called to invite me to participate. My reaction was essentially, "Why? I don't do health policy." Ted then pointed out that I had written books and articles on disability insurance administration, surely a health policy issue, and he understood that I was at work on a book on the regulation of automobile safety: in his view, health policy again. So I joined up and have had a long association with Ted as a colleague, co-teacher, coauthor, friend, and fellow fly-fishing enthusiast.

Ted was coauthor on two of the social insurance books that I mentioned earlier, and association with him stimulated an interest in health insurance reform. That interest produced a number of articles and dozens of opinion pieces, sometimes with Ted, sometimes with others, and sometimes independently. I think I can summarize the core idea of those articles and opinion pieces in a few words. The basic argument was that there are a number of sensible ways to organize health insurance policy, but the United States has managed not to choose any of them.

I do not want to prolong this excursion through my own intellectual history, but I should say something more about the automobile safety regulation project. That project began as a study of the impact of legal culture on regulatory policy in four relatively new regulatory agencies – the National Highway Traffic Safety Administration (NHTSA), the Environmental Protection Agency, the Consumer Product Safety Commission, and the Occupational Safety and Health Administration. The initial plan of the project was to try to determine the influence of general counsels' offices in those administrative agencies on the ultimate shape of regulatory policies. For various reasons the project shrank to focus only on the NHTSA, and the story that my then-student, David Harfst, and I uncovered was fascinating.

In abbreviated form the story was that this agency, initially established primarily to adopt safety performance standards for new motor vehicles, had encountered a legal culture that radically reshaped its agenda. NHTSA was supposed to force the technology of automobile safety on a reluctant group of automobile manufacturers who were convinced that safety did not sell automobiles. It met fierce resistance in the form of judicial review of its rules by what turned out to be a skeptical judiciary. The agency's basic problem was that statute required it to demand safety performance that was "reasonable" and "appropriate" for the vehicles to which those standards were applied. But, if it tried to require anything that was really new, it faced an evidentiary gap. Without on-the-road experience there was no way to demonstrate that those new technologies would indeed be reasonable and appropriate. Within a few short

years the National Highway Traffic Safety Administration virtually went out of the standard-setting business.

Meanwhile, when exercising its other authority, to recall defective vehicles, the agency met with nothing but success. The general law of products liability is quite favorably disposed toward consumer protection. The auto manufacturers' attempts to tie the agency's recall program up in the courts was a complete failure.

The agency was receiving similar signals from Congress and the executive office of the president as well. From a legal point of view this was a very strong object lesson in the general preference of American legal culture for *ex post* compensatory or punitive remedies rather than *ex ante* command and control regulation. And our book created a cottage industry in the exploration of the degree to which rulemaking at the federal level in multiple agencies had become "ossified" and was thus failing to provide the health and safety benefits that were envisaged by those who sponsored and passed the relevant legislation. The debate about the presence or absence of ossification continues in the law journals to this day.

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From a public health perspective, the NHTSA story was rather grim. There is considerable evidence that the performance standards that NHTSA was able to establish in its early years have saved tens of thousands of lives and prevented hundreds of thousands of serious injuries. Alas, there is no evidence that the recall program has anything like similar effects. Exploding airbags and the like make for dramatic press accounts, but vehicle accidents, injuries, and deaths are rarely caused by equipment failures. The legal culture reshaped automobile safety regulation into a form that had vanishingly small impact on the problem that the National Traffic and Motor Vehicle Safety Act of 1966 was meant to address.

This auto safety project continues. Having studied the first twenty years of that regulatory experiment, Harfst and I in the past two years have been researching the subsequent thirty-year history. Our preliminary findings are that NHTSA has learned its lessons well. It is in a way back in the rulemaking business. But instead of forcing technologies that are otherwise not on the agenda of motor vehicle manufacturers, its rules now generally require only the diffusion of safety technologies that are already in many current models, sometimes nearly all of them. And, because automobile manufacturers can hardly complain that technologies they are already using would be unreasonable or inappropriate if diffused throughout their fleets, litigation by manufacturers opposing NHTSA's rules has virtually disappeared. What we now see is a form of cooperative regulation in which the vehicle manufacturers actually set the agenda of safety innovation. NHTSA then seeks to make those innovations available to all consumers. But it is questionable whether these regulatory nudges have any significant effect. Liability concerns would almost certainly drive the automakers to universalize their safety technologies in any event.

One last story on the joys of serendipity. Some years ago I was invited to give a series of lectures in Australia and New Zealand on the history of American administrative law. These were brief fifty-minute overviews concentrating primarily on the

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twentieth century. The accepted view both in the legal academy and among historians and political scientists was that the federal government's activities were sufficiently modest in the nineteenth century that issues of public administration and administrative law at the federal level held little interest until the creation of the Interstate Commerce Commission in 1887. In the course of those lectures some members of the audience generously suggested that I should write a book, a short one, outlining the basic contours of administrative development and administrative law in the United States. Their view was that it would be of considerable interest to non-U.S. scholars and also of use to students just beginning to study the subject.

I thought this a good idea and began the project with a review of developments in the early republic up through the late nineteenth century. The secondary literature was pretty much in agreement that nothing much was going on in that period at the national level. But then I made the mistake of looking at some primary materials, early congressional statutes and early departmental documents concerning the activities of various federal departments. To my surprise I discovered a host of substantial administrative activities and the growth of a sort of internal administrative law related to the processes of determining individual claims and developing general interpretive regulations. In short, there was an administrative law here, but it was mostly invisible to American administrative law's traditional source of legal information – cases in the federal courts – rather than the institutional structures created by congressional statutes and the administrative practices of the agencies Congress had created. For, in the nineteenth century, judicial review of administrative action was through common law forms and highly restrictive prerogative writs that are mostly invisible to modern administrative law scholarship. The result for me was that instead of writing a short book on two hundred years of American administrative history, I spent nearly a decade writing a rather long book on administrative law's first, and "lost," one hundred years.

By now you must be thinking that this fellow is telling a strange tale indeed. He seems to have spent a career bumbling about in disciplines ranging from philosophy, to economics, to political science, to history. Don't legal academics have a discipline of their own? My answer to that is that you have a right to be skeptical that we do. We have a craft and we have quite a lot of institutional knowledge. Whether we have any sort of unified methodology is much more problematic. Legal academics like me tend to be parasites. We borrow from any discipline that looks like it might be useful. So in the end, perhaps, my career has not been accidental. It has been the standard intellectual trajectory of a legal academic parasite.