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Mark Tushnet

Georgetown University Law Center

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THE CONSTITUTION OF THE BUREAUCRATIC STATE

MARK TUSHNET*

I. INTRODUCTION

In 1970 the Supreme Court held in Goldberg v. Kelly,1 that the Constitution guaranteed a relatively formal hearing to any recipient of public assistance whose benefits were threatened with termination. Goldberg can be seen in at least two ways. First, it was one of the last great decisions embodying the humane instincts of the Warren Court. It is unlikely that Goldberg would be decided in the same way today, after a decade and a half of doctrinal development.2 The erosion of Goldberg’s holding is related to the second perspective on the case. In this second perspective, it is seen as the Supreme Court’s recognition that the growth of the welfare state required some response from those who regard enforcing the Constitution as a primary method of regulating government conduct.3 Prior to the 1950s, benefits received from the government were taken to be privileges, not rights, and were therefore immune from regulation under constitutional norms.4 Whatever the analytic merits of the right/privilege distinction—and, as we will see, they are so substantial that the distinction, though expressly interred, is regularly reincarnated—it seemed to make little sense to treat the massive governmental activities of the welfare state as equivalent to the relatively limited activities of its predecessor in the ideology of liberalism, the night-watchman state.

In an influential article relied on by the Court in Goldberg, Charles Reich called the benefits provided by the welfare state “the new property,” serving for their beneficiaries the same social purposes as land and stocks served for their owners,

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* Professor of Law, Georgetown University Law Center. A.B., Harvard University, 1967; J.D., M.A., Yale University, 1971.
A shorter version of this Article was delivered as the Donley Lectures at the West Virginia College of Law, October 6-7, 1983. It develops insights of Alexander, The New Prison Administrators and the Court: New Directions in Prison Law, 56 TEx. L. REV. 963 (1978). I have profited from comments by Steven Goldberg, Pat Gudridge, Joel Handler, Douglas Laycock, Gerry Spann, and participants in the Legal History Program at the University of Wisconsin, 1983.

3 Justice Black’s dissent in Goldberg explicitly links the decision to the growth of the welfare state. 397 U.S. at 271-72 (Black, J., dissenting).

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and deserving the same kinds of protection against arbitrary government action.\(^5\) This Article explores the meaning the Court has given to the new property. The Court's meaning is not what Reich expected, but it has a logic of its own. That logic expresses the Court's vision of welfare state bureaucracies. But because the categories of the Court's logic do not match the usual categories of constitutional analysis, my presentation will necessarily have several layers. Though the presentation is structured around the traditional categories, I will develop a number of unusual perspectives, which ought to be made clear at the outset.

After a brief excursion to remind us that the welfare state is also the national security state, I examine the issue of when the government must provide non-arbitrary procedures as a predicate for its action. I first discuss the analytic issues the Court has raised, and argue that the Court has managed to develop a body of law that cannot make sense on its own terms. I then discuss what I call the pragmatics of the question, to disclose the patterns that underlie the Court's disposition of the cases. Here I introduce the main theme of the Article, which is that the Court's decisions present a vision of welfare state bureaucracies as rationalized and professionalized, terms that I will define in a moment. After elaborating and qualifying this thesis, I turn to the second standard issue, that of defining the contours of the procedures the state must use when it is obliged to use non-arbitrary ones. Here too a preference for professionalism appears. I then examine a number of areas in which the Court has expressly adopted professional norms as constitutional standards, a development that puzzles some observers\(^6\) but which is entirely consistent with my thesis. In the concluding section I examine and reject the major alternatives that commentators have offered to the Court's approach to the second traditional issue, and offer my own proposal.

To introduce my major thesis, I need to rely at least to some extent on a sociology of bureaucracies. All welfare state bureaucracies face serious problems of control, because the "street-level" bureaucrats who actually deliver goods or services to recipients ordinarily have a great deal of discretion regarding the granting of benefits, their size, and their timing.\(^7\) Superiors in the bureaucracy need to control these discretionary decisions in order to assure that general state policies — that just the right amount of goods and services be provided to the right people — are advanced. For present purposes we can distinguish among three types of welfare state bureaucracies according to the methods by which superiors assert control.\(^4\) First, both analytically and historically, superiors in politicized bureaucracies assert control by guaranteeing that subordinates adhere to a political

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\(^7\) See M. Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (1980), for a general view of the problems of hierarchical control in bureaucracies where subordinates must have substantial discretion.

\(^4\) It is worth noting the bureaucracies I discuss all involve persons in situations of dependency. A formal definition of welfare state bureaucracies might focus on their role in distributing various benefits, provided from tax dollars, to recipients who thereby become dependent on bureaucracies.
program set by the superiors. Second, superiors in rationalized bureaucracies assert control by promulgating and enforcing rules that regulate the subordinates. Finally, superiors in professional bureaucracies assert control by participating jointly with subordinates in developing a project, with both material and ideological components, to extend the scope of professional norms with a base outside the bureaucracy.

The distinction among types of bureaucracies plays a central role in what follows. The prototypical politicized bureaucracy is the classic urban machine, which dispensed jobs on city projects, assistance to the needy, and relaxation of rules that otherwise restricted the citizenry's pleasures, all to the end of securing the political allegiance of recipients and street-level bureaucrats. The prototypical rationalized bureaucracy is the Social Security Administration, which dispenses benefits according to a rigid set of rules defining exactly what contributions entitle recipients to how much in benefits. The prototypical professional bureaucracy is the child welfare agency in which social workers are supposed to act on their judgment about what is in the best interest of the child. Even though no real bureaucracy truly exemplifies one of these pure forms, I will treat some mixed types as falling in only one category. In particular, I will treat as a rationalized bureaucracy an agency in which the superiors use professional norms as a basis for developing rules that they impose on their subordinates.

The main theme of this Article is that the Court envisions the welfare state as composed primarily of rationalized and professional bureaucracies. This is emphatically not to say that the welfare state is in fact made up of such bureaucracies, or that a “sound” law of due process can be developed by taking account of modern social science regarding the modes by which superiors in bureaucracies control their subordinates. Rather, my argument is that the Court is constituting the welfare state by articulating its vision of bureaucracies, that the constitution of the welfare state occurs almost subliminally as the Court uses what seem to be natural categories in an entirely unselfconscious way, and that the categories—and therefore the constitution of the welfare state—are not at all natural. That is the point of the Article’s concluding section.

The Court has made the Constitution applicable to rationalized and professional bureaucracies by treating the rules of a rationalized bureaucracy as creating property-like entitlements and by adopting professional norms as constitutional ones. The rules and norms, though treated here as methods of ordering relations within bureaucracies, also give rise to rights in beneficiaries, which affects the actual enforcement of the rules and norms. Further, although the Court has developed


10 Two distinctions should be noted. First, street-level bureaucrats engage in relations in two directions, one with their superiors and one with the recipients of benefits. My thesis is that efforts by superiors to control subordinates affect the relations between subordinates and recipients as well. Second, superiors can assert two kinds of control. They may try to regulate internal operations of the bureaucracy, through rules that regulate hiring and firing, and they may try to regulate the relations...
doctrines that prevent beneficiaries from securing judicial control over politicized bureaucracies through the due process clause, it has developed other doctrines that provide incentives to both superiors and subordinates to convert politicized bureaucracies into rationalized or professional ones. The bulk of this Article is devoted to explaining how one can reorganize the usual categories of analysis so that these themes come to the fore.11

The conclusion discusses scholarly efforts to justify the Court's scheme or to provide an alternative that uses traditional categories more attractively. As I hope to make clear, justification is impossible because the welfare state bureaucracies, as they actually exist, serve functions of social containment that belie the promises of rules and professional norms. But alternatives cast in traditional terms are equally impossible, and for the same reason. In evaluating alternatives, it is useful to recognize that they are defeated by their acceptance of the hierarchy of superiors, subordinates, and recipients. A better alternative, I will suggest, is a repoliticized bureaucracy of a certain sort. Rationalized and professional bureaucracies can be repoliticized in different ways. Politics can be reinserted in rationalized bureaucracies by injecting mechanisms of community control, and in professional ones by insisting on participation by clients in the bureaucrats' decisions. Yet these modes blur into each other as the community that controls becomes the organized client constituency. The Court's disapproval of politics in bureaucracies indicates how radical these suggestions are.

II. EXCURSUS: THE OTHER SIDE OF THE WELFARE STATE

I can highlight what comes later by a brief preliminary on an aspect of the welfare state that is not at all the subject of constitutional law. In addition to providing various forms of material security to its beneficiaries, the welfare state also purchases goods and services on a massive scale, especially for defense and construction of public facilities. Essentially none of these purchases are subjected to constitutional scrutiny,2 and the reasons reveal something about the possibilities

between subordinates and recipients, through rules that specify who should get what. Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 119 (1982), hints at this second distinction in an effort to justify the Court's decisions. These two kinds of control can be exercised in different institutional forms. Most dramatically, superiors may (be forced to) share control over internal operations with public-employee unions, while retaining control over substantive rules. Again my thesis concerns the form of control: politics, rules or professional norms. It seems to me likely that no matter what the institutional mechanisms, the forms of control will be the same in any particular bureaucracy.

11 As the analysis develops, we will see that the image of the rationalized bureaucracy dominates the cases involving deciding when process is due, while that of the professional bureaucracy dominates those involving deciding what process is due. I suspect that this division is an artifact of the decided cases, but it may reflect something systematic that I have overlooked.

12 There are minor manifestations of the Constitution in the national security state. For example, contractors can invoke the due process clause to challenge the procedures by which they are barred from contracts because of their failure to comply with affirmative action requirements. Similarly, issues that in other contexts are constitutional appear in this sector as statutory issues because of the ability of contractors to mobilize the political process to their advantage. See, e.g., Forsham v. Harris, 445
for repoliticized bureaucracies.\textsuperscript{13}

I have already suggested that, given the way the Court sees things, rights in beneficiaries to constitutional protections flow primarily from internal arrangements for control in the bureaucracy. One reason that the Constitution has no bearing on government contracts is that the organizations receiving grants are private agencies whose internal arrangements are free from constitutional control and whose beneficiaries therefore have no derivative constitutional rights. \textit{Rendell-Baker v. Kohn} makes this clear.\textsuperscript{14} There a nominally private school provided educational services to children with "special needs" such as drug problems. State and federal law required that the students receive an education, and the school received essentially all of its operating funds from contracts with local school boards to provide the special kinds of education that the boards were unable to provide themselves. Rendell-Baker taught at the school. She criticized its board of directors for their educational policies, whereupon she was fired. Had her employer been a school board, that would have violated her right to free expression. But because the board of directors was private, Rendell-Baker was not protected by the Constitution.\textsuperscript{5}

Government contractors differ from other recipients of the welfare state's benefits in other ways. First, especially in the defense industry, the government either is a monopsonist — the only possible purchaser of the goods — or has substantial market power. Contractors are reluctant to disrupt working relationships by bringing in a new player, the courts, and especially new rules, the Constitution. In contrast, recipients of public assistance may annoy superiors by challenging their

\textsuperscript{13} The welfare state and the national security state are historically linked. In order to secure and then maintain American hegemony over the world capitalist economy, a large military effort was required. Devoting resources to that end, however, threatened to deprive the government of the domestic support essential to stability. The welfare state provides enough benefits to preserve stability and, at least until the 1970s, American hegemony allowed the state to finance those benefits from its dominant position in the world economy. \textit{See} A. \textsc{Wolfe}, \textsc{The Limits of Legitimacy: Political Contradictions in Contemporary Capitalism} (1978). The massive institutionalization of the American welfare state after World War II accompanied the rise of the national security state. The initial steps toward the welfare state had been taken in the early twentieth century, when Progressive reformers developed a rationale for public assistance that combined themes of humanitarianism and social control. Although the peacetime military establishment remained small until 1945, the conceptual basis for defending its growth had been laid earlier. \textit{See} G. \textsc{Fredrickson}, \textsc{The Inner Civil War} (1968); S. \textsc{Skowronek}, \textsc{Building a New American State: The Expansion of National Administrative Capacities, 1877-1920} (1982). The latter work contains a useful examination of the transformation of American military capacities.

\textsuperscript{14} 457 U.S. 830 (1982).

\textsuperscript{15} The Court hinted that she would have been protected by the Constitution had the state regulated the school's employment practices. \textit{Id.} at 836. This is yet another version of the positivist trap, \textit{see} text accompanying notes 27-28 \textit{infra}, for the state would regulate those practices only to a specific extent, beyond which it would leave decisions to the "private" parties. In unregulated areas of employment practices, Rendell-Baker would be in exactly the position she found herself when the state did not regulate employment at all. For an interesting \textit{pre-Rendell-Baker} case arising in the national security sector, see Holodnak v. \textsc{Avco Corp.}, \textsc{Avco Lycoming Div.}, 514 F.2d 285 (2d Cir. 1975), \textit{cert. denied}, 423 U.S. 892 (1975).
policies, but that is unlikely to affect the discretionary decisions made by the street-level bureaucrats. Second, and related to the first, government contractors have enough political power to influence the development of statutory protections of their interests. In this sense they do not need the Constitution to protect them. Again, recipients of public assistance lack substantial political power and must call on the courts for aid in controlling the bureaucracy.

Finally, and perhaps most important, government contractors want to preserve the opportunity for political intervention on their behalf. It is useful to have things set up so that a senator can call the right person to influence the award of a contract. The demise of urban political machines meant the elimination of those opportunities for recipients of public assistance. As we will see, some of the present law of the bureaucracy erects obstacles to the reemergence of such machines.

Taken together, these aspects of government contracting show how important politics is in the ordering of relationships in this branch of the welfare state. Eliminating politics from the other branch may have the effect of diffusing potential threats to political stability.

III. When Does the Constitution Apply?: Analytics

Before the growth of the welfare state, it seemed easy to decide when the Constitution applied. The due process clauses provide that governments may not deprive people of life, liberty, or property without due process. If a government took some stuff away from you, it had to use fair procedures. And “stuff” was meant almost literally. The operative image was that you had some land, or some cash in your pocket, and a government official wanted to take it away. As governments began to regulate the use of property of which people retained formal ownership, this image became harder to make real. Property began to seem, not some tangible “stuff,” but a group of rights to use tangible stuff subject to various kinds of regulation. Still, an owner might be thought of as someone who had a bunch of those rights in his or her pocket, and then the image of deprivation could work — for a while.

All of this broke down over the course of the twentieth century. In constitutional law one key moment came in 1972, two years after Goldberg. Goldberg had treated public assistance as a form of property, but without extensive analysis. The Court said, “Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights.” As Justice Black pointed out in dissent, the first sentence concealed a

16 For a dramatic example, see Plater, Reflected in a River: Agency Accountability and the TVA Tellico Dam Case, 49 TENN. L. REV. 747 (1982), recounting the intervention of a senator to preserve the Tellico Dam after a cabinet-level committee had concluded that the costs of completing the dam outweighed the benefits a fully-operating dam would provide.

17 See D. Bell, supra note 9.

18 See generally, B. Ackerman, Private Property and the Constitution (1977).

19 397 U.S. at 262 (footnote omitted). The footnote quotes from and cites to articles by Charles Reich.
serious problem. The recipient was entitled to the benefits only if she or he satisfied the statutory requirements, but in the case at hand the state officials had claimed exactly that the recipient did not satisfy the requirements and so was not entitled to the benefits. Justice Black argued further that the second sentence, invoking the importance of the rights, had two troublesome implications. First, the Court had rhapsodized about the "desperate" situation of a recipient "deprived of the very means by which to live while he waits," in order to distinguish Goldberg from prior cases involving "blacklisted government contractor[s and] discharged government employee[s]." But Black, as we know from other contexts, regarded "importance" and similar standards as inadequate to control willful judges. Second, Black noted that "[t]he operation of a welfare state is a new experiment for our Nation." He did not want these "new experiments in carrying out a welfare program.... [to] be frozen into our constitutional structure."

A. The Positivists Approach and Its Trap

Two years after Goldberg, the Court adopted a position that met the concerns Black had expressed. In Board of Regents v. Roth, an untenured professor at the University of Wisconsin was not rehired when his contract expired. He sued the Regents, claiming that they had not rehired him because of some speeches he had made, and that, in any event, due process required that the Regents give him at least a statement of the reasons for their decisions. As the case was presented to the Supreme Court, only the due process issue was involved, but the Court did note that Roth might still prevail on his first amendment claim. However, it rejected his due process claim. The Constitution protected liberty and property against deprivation without due process. But not every interest that a litigant regarded as important was liberty or property. Property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." A person like Roth was entitled to due process only if state law created "a legitimate claim of entitlement." Thus, what mattered was not the importance of the interest affected but whether state law recognized the interest as one deserving protection. Experimentation in the welfare state could continue so long as states figured out that they should define the interests affected by experiments in ways that did not create legitimate claims of entitlement.

Justice Black's other concern was implicitly addressed in Roth. When Justice Rehnquist later made the point explicitly, a majority of the Court and most commentators vehemently rejected it, believing that Rehnquist had converted Roth's reliance on positive law into a positivist trap. Yet, I will argue, no one has been
able to devise a satisfactory analytic alternative. *Arnett v. Kennedy* involved Kennedy, a nonprobationary federal employee who worked in a regional office of the federal poverty agency. He was fired by his superior on the ground that Kennedy had falsely stated in public that the superior had attempted to bribe a grant recipient by offering it a $100,000 grant if its officers signed a statement against Kennedy. As civil service statutes required, Kennedy received a notice of the proposed firing and was given an opportunity to appear before his superior to answer the charges. Under the statutes, a trial-type hearing was available only after the firing. If Kennedy prevailed on appeal from the firing in that hearing, he would be reinstated and receive back pay. Kennedy claimed that due process required a trial-type hearing before removal, and a decision by an impartial decision-maker, not by the very person whom he had charged with bribery. The Supreme Court rejected Kennedy's claim. Two Justices said that, in light of the government's interest in efficient operation, the statutory procedures satisfied due process.

Justice Rehnquist, joined by two others, took a broader position. He argued that the due process clause was irrelevant in the circumstances. *Roth* established that Kennedy had to have a legitimate claim of entitlement, grounded in a source like positive state or federal law, in order to have a property interest protected by the due process clause. But, according to Justice Rehnquist, when one looked at the relevant positive law, one saw in it a combination of substantive provisions giving civil service employees various rights, and procedural provisions describing the manner in which those rights can be terminated. Reviewing the history of the civil service system, Rehnquist concluded that the combination of substantive and procedural provisions formed an unbreakable package: "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [Kennedy] must take the bitter with the sweet." In an argument that echoed Black's concerns in *Goldberg*, Rehnquist pointed out that the package embodied a compromise in which those who feared that a civil service system would be rigid and inefficient were pacified by provisions allowing quicker action than people in Kennedy's position would have liked.

If *Roth's* reliance on positive law as the source of entitlements is accepted, it is hard to resist the analytic force of this argument. Nor can it be confined to situations in which the legislative history explicitly reveals a compromise between substance and procedure. Assume that a legislature enacts a substantive entitlement and relies on existing law, such as a long-established administrative procedure act, to provide the procedures for divesting the entitlement, or commits to an agency the decision about what procedures to employ. The argument from compromise is that the legislature gave the entitlement the scope that it did, and not a narrower one, because it knew what the procedures were or trusted the agency,
not the courts, to come up with appropriate ones. The difficulty, as Justice Powell said in *Arnett*, is that relying on positive law to define a package containing entitlements and procedures deprives the due process clause of any independent content. When the legislature creates an entitlement, the procedures it creates (or relies on) satisfy due process by definition. Further, as Douglas Laycock has pointed out, the positivist trap conflicts with the syntax of the due process clause, which reads as if people first have property which they then cannot lose except by fair procedures.

B. Alternative Approaches

No one has been able to develop an alternative that accepts *Roth’s* reliance on positive law to create substantive entitlements. Two unsatisfactory approaches are commonly suggested. One accepts *Roth* and tries to distinguish between old forms of property, as to which entitlements are independent of procedures, and new ones, as to which entitlements and procedures are a package, unless the new ones are so much like the old ones in relevant respects that the courts should require due process. The problem with this approach is that the distinction and analogy between some forms of new property and the old property cannot be sustained. The second approach rejects *Roth* and argues that the fairness of the procedures depends on the importance of the interests affected whether or not those interests are recognized as entitlements by positive law. The problems with this approach are that there are no satisfactory criteria of importance, and that it blurs the intuitively appealing distinction between new and old property.

Both approaches begin with the perception that we grasp the meaning of the due process clause by starting with an image of property as material stuff that we can hold in our hands: land, houses, tables, and chairs. This old property has a number of characteristics, of which two are important here. Old property was protected by a variety of positive provisions of statutory and common law, which seem initially to be stable, unlikely to be altered; this characteristic lies behind the first approach, which I will label “traditionalist.” Also, when we have old property in our hands, we are allowed to do pretty much what we want with it so that we can achieve a number of goals we value; this characteristic lies behind the second approach, which I will label “natural law.”

1. The Traditionalist Approach

The stability of protection given old property animates the traditionalist approach, which tries to analogize old property to some forms of new property. But extending protection to some forms of new property and continuing the protection given old property are difficult to justify in the welfare state.

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28 *Id.* at 166-67 (Powell, J., concurring).
With the development of regulation in the welfare state, the sense of old property as material stuff begins to dissolve. Treating property as protected by substantive entitlements independent of procedures works only so long as the substantive entitlements remain stable over a relatively long period. You own your house and feel protected by the law in your ownership. But suppose you try to add a modern wing to it, and discover that external alterations are prohibited by a law designating your neighborhood as a historic district. It begins to seem as if your ownership is qualified by the historic preservation law. And if you feel aggrieved because you never knew that the neighborhood would be so designated, you will begin to think your ownership was qualified by the procedures for creating historic preservation districts. Thus, even as to the material stuff that is at the heart of the old property, the entitlement theory begins to collapse the distinction between substance and procedure. Laycock argues that traditional or old property forms "the core" of the substantive concepts involved in these cases, and that we should try to work from that core to the boundaries: "Clear cases shape our understanding of concepts and thus guide the analysis of hard cases." But the clarity cannot be sustained in the welfare state. The traditionalist approach preserves the symmetry between the old and the new property, not by extending protection to new property but by recognizing that old property is unprotected too.

In addition, the traditionalist approach gives us no criteria for moving from the core to the boundaries, except to appeal to intuitions about resemblances between old and new property. Those intuitions are codified in the natural law approach.

2. The Natural Law Approach

The second main approach to new property develops the theme of "importance" that troubled Black in Goldberg. The Court in Roth was concerned that every aspect of the welfare state ought not be constitutionalized. It set the limit of constitutional protection at entitlements created by positive law. The natural law approach rejects that limit and creates another one. I have mentioned that old property is valuable because it allows us to carry out life-plans that are important to us. Charles Reich argued that new property served exactly the same purpose. The natural law approach pursues the analogy by setting the limit of constitutional protection at interests or benefits which are similarly important in allowing recipients to carry out their life-plans.

This approach is vulnerable from several directions. First, as I have argued

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11 Laycock, supra note 29, at 882.
12 See B. ACKERMAN, supra note 18.
13 See Van Alstyne, supra note 4, at 1463 n.73.
14 See Monaghan, supra note 2, at 407, 409 (clause protects "all interests valued by sensible men").
elsewhere, we do not have available to us natural law criteria that identify important interests in a way that satisfies the demand for controls of judicial willfulness. Every plaintiff will claim that his or her interest is important enough to require more procedural protections than were provided; every defendant will claim that the interest was only so important as to require precisely the procedural protections that were afforded, no less of course but certainly no more. Without a correct moral theory, or a theory on which we can agree, this dispute is irresoluble. Second, the rise of the welfare state has made apparent what was always true: that social arrangements are, at least within limits so broad as to be irrelevant here, artificial and not natural. It is hard to understand the sense in which a recipient of public assistance has a natural right to that assistance, given that the welfare system is so patently artificial. To put it only slightly differently, it is less likely that the proper moral response to Kelly's loss of benefits is providing a trial-type hearing than that the proper response is redistributing wealth so that people do not fall into Kelly's plight in the first place.

Finally, the natural law approach does not capture the distinction between old and new property. Because the benefits of the welfare state are not material stuff, we have to develop analogies to old property. But old property is so various that every benefit is as analogous to old property as any other. On the one hand, things like public assistance are as important today as property in land used to be to its beneficiaries. On the other, old forms of property—incorporeal hereditaments such as property rights in specific ministries, for example—perhaps used to be important, just as civil service jobs are, but would now seem so trivial that even trivial benefits do today what incorporeal hereditaments used to do. The effect of this two-fold attack is either to put old property up for grabs or to convert every benefit of the welfare state into new property. This, of course, repudiates the effort in Roth to place limits on the new property.

C. The Analysis of Liberties

What of limits on the "new liberty"? The due process clauses apply to liberty as well as property. Is liberty protected only by positive law too? The answer is a qualified no. Consider Santosky v. Kramer, where the Court held that the Constitution required a state, in its process for terminating the rights of parents to control the upbringing of their children, to establish the grounds for termination by clear and convincing evidence rather than by a preponderance of the evidence as state law allowed. The Court did not worry about the fact that a biological

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15 The literature on due process tends to ask the question from the other direction: if a state has no duty under the Constitution to establish a benefit system, how can a potential recipient have a constitutional right to receive a benefit within that system?
17 455 U.S. 745 (1982). Laycock, supra note 29, at 880, develops a related hypothetical dealing with "conditional life," that is, a right to life conditioned on the state's use of various procedures for its deprivation, which procedures might by statute omit proof of guilt beyond a reasonable doubt.
parent's rights over his or her children are created by positive law too. Instead, it relied on the Court's "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest. . .." A series of cases involving the rights of prisoners forms a useful contrast to Santosky. In those cases the Court has held that a prisoner's right to remain in an institution near his home — indeed, in one case in Hawaii rather than 3,000 miles away in California — is protected by due process guarantees only if positive law confers that right, and that a prisoner's expectation that an announced parole date will be honored is protected in a similarly limited way.

Further, there is a sense in which property is valued because it promotes liberty, by allowing people to pursue their life-plans. To the extent that property is protected only by positive law, so to is liberty in that respect. For example, in Paul v. Davis a police chief distributed a list of "active shoplifters" to merchants around Christmastime. Davis' name was on that list, because he had been arrested for shoplifting nearly a year earlier and because the chief had made no effort to determine whether, as was indeed true, the charges had been dropped. The Court held that Davis could not recover damages for an alleged violation of his right not to be punished without due process, because his interest was not protected by state law. I find it convenient to think of Paul v. Davis as a property case, in which an old property right — to a reputation that, for example, can be capitalized in a credit rating — was taken. That, after all, is how Iago wanted people to think of the matter. But others prefer to treat the case as involving liberty: the imposition of punishment and the denial to Davis of job opportunities.

Paul v. Davis and the prisoner rights cases may make only limited inroads on traditionalist and natural-law approaches to liberty. The core of liberty, the right to walk around on the streets as you choose, remains clearer to us than the

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33 Though the point may perhaps be weaker as to mothers because of their physiological connection to their children, surely my attachments to my children are what they are less because of the biological relationship to me than because positive law has guaranteed from the outset that if I behave I will have the right to control their upbringing, within limits themselves defined by positive law. Lehr v. Robertson, 103 S. Ct. 2985 (1983), ought to make this clear. I take it that the use of the possessive — itself a significant word — in connection with the young people who live at the same address as I do makes the point.

41 See Van Alstyne, supra note 30, at 483-84.
43 Cf. Van Alstyne, supra note 30, at 479 n.97 (Iago claims a "natural property" in his reputation).
44 See Monaghan, supra note 2, at 428-29; Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293 (1976).

41 For example, while it is hornbook law that prisoners have not lost all their rights because they have been convicted, the substantial restrictions on their liberties that conviction justifies also make less plausible claims that any particular additional liberty ought to be retained. Compare Meachum v. Fano, 427 U.S. 215, 224 (1976), with Procunier v. Navarette, 434 U.S. 555 (1978). On the other hand, it is also true that, given the substantial restrictions on liberty, the marginal value of additional liberty to a prisoner will be greater than it would seem to an outsider.
core of property. It has suffered much less conceptual attack with the rise of the welfare state. But in the remainder of this Article, I will rely indiscriminately on property and liberty cases, for several reasons. First, the prisoner rights cases involve matters such as transfers between penal institutions, parole, and probation. Instead of absolute deprivations of liberty, they are conditional ones, both analogous to conditional rights to public assistance and products of the Progressive impulses that also generated the welfare state.

Second, and related, these forms of conditional liberty are models for other ways in which the welfare state erodes traditional liberties. For example, Wyman v. James held that a social worker need not obtain a search warrant before visiting the home of a recipient of public assistance. Such a visit was not a search, in part because the social worker's purpose was to determine whether children were being treated well and in part because it was fair to condition public assistance on relinquishing some privacy. In other cases the Court has held that government agents need no warrants to search the premises of highly regulated businesses such as liquor sales, gun sales, and mining. These cases show that the welfare state can operate in ways that implicate traditional or core liberties, and that the doctrinal tools to exert pressure on core liberties are as available here as were similar tools in the case of core property. I suspect that the tools have not been employed in liberty cases primarily because of the political power of those most protected by core liberties. Seen in this way, the positive law approach to liberty can be used to explore the Court's vision of the Constitution in the welfare state. Paul v. Davis and the prisoner rights cases may foreshadow the future.

IV. WHEN DOES THE CONSTITUTION APPLY?: PRAGMATICS

I have argued that Roth left the law regarding when process was due in conceptual disarray. Not surprisingly, though, the Court has chugged along making decisions in the area every year. These decisions appear to be quite arbitrary within the express terms of the analysis, as indeed they must be so long as one takes those terms as the only relevant ones. But I will offer a different perspective on the cases which, I believe, begins to make sense of them.

46 Warren, New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926); Monaghan, supra note 2, at 411-12.
47 See, e.g., D. Rothman, Conscience and Convenience (1980).
50 Van Alstyne, supra note 30, at 487-90, argues that freedom from arbitrary procedures ought to be regarded as a liberty protected by the due process clause. Smolla, supra note 10, at 98 n.108, and Williams, Liberty & Property: The Problem of Government Benefits, 12 J. Legal Stud. 33 (1983), effectively point out the syntactical difficulties in that position: it amounts to saying that the government shall not deprive people of their freedom from arbitrary procedures ("liberty") without giving them fair procedures ("due process"). See also Laycock, supra note 29, at 878 n.15.
51 It does not make sense of them all. See, e.g., Memphis Light, Gas & Water Div. v. Kraft, 436 U.S. 1 (1978).
A. The Constitution and Rationalized Bureaucracies

One way of looking at the cases is this: When the Court wants to impose procedural requirements, it finds entitlements in positive law and natural law guarantees of liberty or property; when it does not want to impose such requirements, it finds no entitlements and ignores natural law arguments for liberty and property in the circumstances. In this perspective the interesting question becomes, when does the Court want to impose procedural requirements. The answer, I think, is that it does so when it is dealing with rationalized or — less significantly in this setting — professionalized bureaucracies. If that is correct, the Court's view is that the Constitution regulates modern bureaucracies but not old-fashioned ones. As we will see, there are collateral doctrines that ameliorate the apparent perverseness of the incentives that this view gives decision-makers.

Two years after Roth, the Court decided Wolff v. McDonnell. Prisoners in Nebraska had been disciplined for violating prison rules, and as a result lost "good time credit" that would have reduced the time they had to serve in prison. By written regulations adopted by prison authorities, good time credits could be revoked only for serious misconduct. The prisoners claimed that the procedures for determining whether they had engaged in serious misconduct were inadequate. En route to agreeing with most of the prisoners' claims, the Court had to face the Roth question. It held that the prisoners had a liberty interest in good time credit, for two reasons. The State had "specified that [good time] is to be forfeited only for serious misconduct," and the prisoners' interest in shortening their sentences "had real substance." Thus, although "the liberty itself is a statutory creation of the State," due process was required in determining whether serious misconduct had occurred. Though the Court emphasized the State's creation of the interest in its positive law, the close relation between good time credit and the traditional liberty to walk the street allowed the Court to juxtapose the positive and natural law approaches.

The juxtaposition was even clearer in two later cases. High-school students in Goss v. Lopez were temporarily suspended for participating in various incidents of misconduct, most of which occurred during or as a result of student demonstrations. They claimed that the procedures leading to suspension were inadequate. The positive law approach does have independent force, however, in cases where as a matter of state law, entitlements are (more or less) clearly created. See, e.g., Greenholtz v. Inmates, 442 U.S. 1 (1979). Yet the rhetoric of Greenholtz betrays a reluctance to find state law entitlements. See id., at 9-11. Compare Bishop v. Wood, 426 U.S. 341 (1976), and Olim v. Wakinekona, 103 S. Ct. 1741 (1983), in which the Court declined to interpret state law to create entitlements. Early comments on Bishop treated it as adopting the positivist approach, see, e.g., Monaghan, supra note 2, at 442-43. But the Court has instead treated it as relying on the trial court's bizarre interpretation of state law. It has therefore become a sport.

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adequate, and the Court agreed. It found a "legitimate claim of entitlement to a public education" in the provisions of state law establishing a public school system and requiring young people to attend schools. In addition, it found a liberty interest in avoiding "damage [to] the students' standing with their fellow pupils and their teachers as well as interfere[nce] with later opportunities for higher education and employment" if the charges of misconduct were sustained. It is important for my theme to note that the Court held that temporary suspensions must be preceded by "oral or written notice of the charges . . . [and] an explanation of the evidence the authorities have and an opportunity to present [the student's] side of the story."

It suggested that in most cases it would be enough that "the disciplinarian . . . informally discuss the alleged misconduct with the student minutes after it has occurred." It treated these requirements as "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."

Finally, *Vitek v. Jones* involved the transfer of a prisoner from a prison to a state mental institution. The prisoner had been convicted of robbery; shortly after he arrived at the prison, he set his mattress on fire, and prison officials, regarding him as suicidal, transferred him to a mental hospital. The Court found that State statutes created a liberty interest in remaining in a prison when they identified specific grounds for transfer to a mental hospital: the State "grant[ed] . . . a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior . . . ." In addition, there was a liberty interest that even prisoners had in avoiding the further stigma that is imposed by being labelled mentally ill.

The prisoner rights cases mentioned above provide an important contrast to these three cases. In *Meachum v. Fano* the Court held that the due process clause was inapplicable in cases involving transfers of prisoners from less-restrictive to more-restrictive institutions "absent a state law . . . conditioning such transfers on proof of serious misconduct." The Court relied on *Roth* to reject the claim that the "change in conditions of confinement having a substantial adverse impact on the prisoner" was a "grievous loss" that standing alone gave rise to a liberty interest. This was because the prisoner's conviction authorized the state "to confine him in any of its prisons." Only if state law limited the discretion of prison officials to transfer prisoners would due process be required. *Meachum* was followed in *Olim v. Wakinnekon*, where the court held the due process clause inapplicable in a transfer from Hawaii to a mainland prison. The Court in neither case thought

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419 U.S. at 565.

Id. at 581.

Id. at 582.

Id. at 565.


Id. at 490-91.


Id. at 224.

103 S. Ct. 1741.
the prisoner's interest in remaining near family and friends sufficient under a natural law approach to make the due process clause applicable.

The counterpoints to Wolff v. McDonnell are Connecticut Board of Pardons v. Dumschat and Jago v. Van Curen. Dumschat was sentenced to life imprisonment for murder. Under state law he was entitled to request a commutation of his sentence in order to accelerate his eligibility for parole. Over three-quarters of the prisoners with life sentences who sought commutations received them, and were promptly paroled. Dumschat argued that this practice created a Roth-type "claim of entitlement" to commutation and therefore required the Board to give him a statement of its reasons for refusing to commute his sentence. The Court held that the practice was not wide-spread enough to create an entitlement under positive law. In Van Curen the prisoner had received a notice that he would be paroled on April 23. When the parole officials learned that he had lied to them in an interview, they revoked his parole date. The Court held that due process was not required: the officials had complete discretion to set a parole date and were therefore not required by state law to make any specific findings of fact. Again in neither case did the Court find a natural law liberty implicated in an official decision that severely disrupted the plans the prisoners had begun to make based on widespread practice or specific information regarding the time when they were likely to be released.

It would not have been difficult in the prisoner rights cases to find natural law liberties. Nor would it have been difficult to interpret state law to create positive law entitlements; the statutes interpreted in Goss v. Lopez to create entitlements were no more directly relevant to the issue of entitlement than were the statutes creating a system of parole in Van Curen. On the other side, the Court could easily have interpreted the statutes in Vitek to commit to their discretion the decision about whether information available to officials regarding a prisoner's mental health justified a transfer to a mental hospital. That is only to drive home the point that neither Roth nor the alternatives are analytically dispositive. What does distinguish the sets of cases is that the Court holds the due process clauses applicable where it views decision-makers as constrained by rule or professional norms, and

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66 A popular reading of the distinction between Meachum and Vitek makes dispositive the presence of "specified grounds" in the latter. See also Dixon v. Love, 431 U.S. 105 (1977) (summary suspension of driver's license for accumulating points based on traffic offenses, as specified in administrative rules, is constitutional). The idea is that hearings are useful to determine facts, but if the authorities need not make any factual determinations before acting, hearings are pointless. This reading is flawed in two ways. First, a presentation at a hearing may affect the way a decision-maker exercises discretion. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778, 786-88 (1973). See Michelman, Formal and Associational Aims in Procedural Due Process, 18 NOMOS: DUE PROCESS 126, 130, 143 (J. Pennock & J. Chapman eds., 1977); Smolla, supra note 10, at 105. Second, every system of state law and administrative regulations contains enough leeway for the courts to find a "specific grounds" requirement if they want to.
67 Sometimes the categories collapse into one, as in Vitek, involving doctors in rule-governed bureaucracies, and Goss, involving professional principals.
holds it inapplicable where it views decision-makers as unconstrained. Yet all bureaucracies are to varying degrees politicized, rationalized, and professional. In some cases the Court emphasizes one rather than another facet of the bureaucracy, and in other cases it reverses the emphasis: Parole decisions are rationalized (Wolff), but not always (Van Curen); prisons are professionalized (Vitek) in some of their operations (Meachum). But what matters is that it is the idea of bureaucracy to which the Court is reacting.

B. Rules Without Rights: An Excursus Into Criminal Procedure

In the cases I have discussed so far, the internal regulatory methods by which superiors control the discretion of subordinates give rise to rights held by persons outside the bureaucracy. A series of cases in criminal procedure also makes the existence of rules as a method of hierarchical control relevant to the decision of constitutional issues. But whereas rules give rise to rights that the courts enforce in the due process area, they insulate police agencies from external control in the criminal procedure area. I will suggest in the next sections that the Court's vision, as expressed in a broad range of cases, is indeed of self-contained bureaucracies governed by internal rules and internalized professional norms. That is, the central constitutional issue concerns the internal operation of bureaucracies, not the relation between street-level officials and beneficiaries and clients. In effect the Court sees hierarchical control within the police agency as an alternative to hierarchical control by an external agency—by magistrates through the warrant system.

The criminal procedure cases deal with searches. The hornbook law is that subject to a limited number of exceptions, the police must obtain a warrant before they conduct a search. Some recent cases, invoking narrow exceptions, suggest a broader principle that no warrant is needed when the search is conducted pursuant to routine procedures whose effect is to place bounds on the discretion otherwise available to police officers. In South Dakota v. Opperman, the police towed Opperman's car to the police station after finding it parked in a no-parking zone, and then conducted what was called a routine inventory search to determine what was in the car.68 The bureaucratic rationale for inventory searches is that they protect the police against claims that some valuable object was stolen while the car was in police custody, that they allow the police to determine what actions are appropriate to protect the car from vandalism, and that they assure superiors that subordinates have no temptation to remove items from the car. The inventory search in Opperman disclosed drugs in the glove compartment. Opperman sought to have the drugs excluded from use against him. Earlier exceptions to the warrant requirement allowed police officers to search cars as incident to an arrest, on the theory that the arrestee might have access to weapons or might be able to destroy evidence, and, where the police had probable cause to believe that there was evidence in the car, to delay the search until the car had been secured at the police station.69 These

exceptions were inapplicable in *Opperman*: Opperman had no access to the car when the search occurred, and the police had no reason to believe that drugs were in the car. Nor would it have been extremely difficult to secure the car for the relatively brief period needed to obtain a warrant. Thus, the fact that the inventory search was "routine" was dispositive.\(^\text{70}\)

In another line of cases the Court has considered a variety of efforts by police agencies to detect crimes that occur intermittently over a large area and for what amount to long periods: drunk driving, importation of undocumented aliens, and drug-smuggling. The Court has held unconstitutional random stops of drivers for breath tests,\(^\text{71}\) and "roving check-points" at which officers stop some drivers who pass the point the officers have chosen.\(^\text{72}\) It has permitted stops at fixed check-points\(^\text{73}\) and has strongly hinted that roadblocks could be established to screen all drivers for sobriety.\(^\text{74}\) Although the cases can be reconciled in a number of ways, the discussion so far should make one of them obvious. The pairs of situations differ in the location of the authority to institute the stop. Line officers decide which cars to stop at random and which drivers to stop at roving check-points whose location they have chosen. In contrast, superior officers decide where to place a fixed checkpoint, and, in view of the public attention a sobriety roadblock will inevitably attract and considering their broader view of where drunk drivers are likely to be found, are likely to decide where to put up the roadblocks.

I have mentioned the cases allowing warrantless searches of places where heavily-regulated businesses are conducted. If the businesses are not heavily regulated, but are still subject to limited regulations — fire codes or occupational safety laws — then warrants are required.\(^\text{75}\) Recognizing that these laws can be enforced effectively only if the enforcement agency is able to make spot-checks, the Court has suggested that the agency could use special kinds of warrants. It could establish a program of inspecting business places in industries where the rate of accidental injury is highest, and so on. That is, the warrant would be issued not on the ground that there was probable cause to believe that the law had been violated but on the ground that the enforcement agency had a set of rules saying, in effect, that it was time for the place to be inspected. Notice that such rules, whatever their effect on business, allow superiors to check on the work of enforcers at the street level: they are, or at least can be used as, production quotas or measures for inspectors.

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\(^\text{70}\) The role of routine is confirmed by *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983), where the Court found constitutional an inventory search of a backpack. Obviously the car search cases were not directly relevant, and securing the backpack unopened would have been simple. For a general discussion of inventory searches, see *United States v. Lyons*, 706 F.2d 321 (D.C. Cir. 1983).


\(^\text{72}\) *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).


Rules that routinize police behavior but do not confer rights are also found in the law of search incident to arrest. *Chimel v. California* rationalized prior law in holding that, in the course of arresting a person, the police could search only the area in his or her immediate control: Such searches were justified on the ground that the arrestee might destroy evidence or grab a weapon to assault the police, which he or she can do only within a limited area; the justification does not extend to other areas, searches of which require warrants. In *United States v. Robinson* the police arrested Robinson for a traffic offense. Given his record, the offense required that he be taken to the police station. Departmental rules stated that, when they made such "custodial" arrests, the police should conduct a full search of the arrestee’s person. In the course of that search the police found a crumpled cigarette package which they opened. In it were drugs. Robinson sought to suppress the drugs in his subsequent trial for possessing them, arguing that the full search and opening the package were not justified by the reasons for searches incident to arrest: There was no evidence of the traffic offense to be destroyed, and whatever threat might be concealed in the package — a razor blade is about all it could have been — could have been eliminated by seizing but not opening the package. Some observers hoped that the Court would uphold the search because it was specifically authorized by departmental rules, but the Court went off on different grounds. It argued that police officers face a wide variety of situations in conducting arrests. They cannot be expected to think through a complicated set of rules by asking themselves, for example, whether the arrestee has access to evidence that might be destroyed or whether this package, wallet, or bag might contain a weapon. Rather, they need clear rules that can be adopted as part of a relatively simple routine: "if it's a custodial arrest, I can conduct a full search." The Court later extended its preference for simple rules to cases involving searches of cars incident to arrest: The police can search the entire passenger compartment of a car incident to the arrest of a person in it, even if the person no longer had access to the contents of the car.

In these "search incident to arrest" cases, the Court is not of course ratifying decisions made according to rules developed by police or enforcement agencies, as it is in *Opperman* and the business regulation cases. But it is acting on an image of police officers as the kind of people who need guidance by clear and simple rules. Those rules, whether developed internally or externally, form a system of regulating the exercise of discretion analogous in some ways to systems of utilitarian

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79 See also Gustafson v. Florida, 414 U.S. 260 (1973) (upholding a similar search where no departmental rules were involved).
80 *Robinson*, 414 U.S. at 235.
generalization which take as the model of a moral system a set of rules simple enough to learn that will promote utility better than any other system equally or more simple. As we will see, the resemblance to utilitarianism may be significant. For now it is useful to contrast the Court’s preference for rules in this context with its preference for standards in another context involving searches.

Occasionally the police do try to get search warrants. They go to a magistrate — usually a judge but not necessarily — and swear that they have certain information. If that information amounts to probable cause to believe that evidence is at the place the police want to search, the magistrate issues the warrant. The crucial step is the magistrate’s evaluation of the information presented by the police. Sometimes the police rely on facts given to them by an outside informant. Over the years a complex set of rules developed to guide the evaluation of police statements relying on informants: The police had to give the magistrate enough information to allow him or her to evaluate the credibility of the informant — for example, that the informant had given information that had proved true in the past — and to evaluate the basis on which the informant rested the information—for example, that the informant had seen drugs at the location described. Further, some deficiencies in the informant’s statements could be made up if the police said that they had confirmed the accuracy of some parts, even innocent details, of what the informant had told them. In Illinois v. Gates the Court did away with this elaborate rule structure. The detailed rules, it said, should do no more than point out to magistrates some things they should think about before issuing warrants. Their decisions should be guided not by rules at all but by a general standard of reasonableness: Given what you know, the Court said to magistrates, decide whether as a common sense matter it is reasonable to think that the evidence is where the police want to search. It further emphasized the deference appellate courts should give to the magistrate’s initial determination of probable cause.

Rules and standards are alternative ways of regulating the activities of street level bureaucrats such as police officers and magistrates. The pattern here treats the police as a rationalized bureaucracy in which superiors have to control relatively unsophisticated line officers through relatively crude rules, and the judiciary as a professionalized bureaucracy in which superiors can trust subordinates to exercise discretion appropriately because they all share a common ethos. Gates announces the Court’s new understanding that magistrates are enough like judges to make it appropriate to subject them to control by professional norms, rather than by rules whose use would be appropriate if magistrates were really like police officers.

Of course this pattern may be an artifact. The majority of the present Court does not like to restrict the activities of the police in conducting searches or in much else. It may simply be using whatever tools are within easy reach to validate what the police have done in the cases before the Court. And yet I suggest that the pattern here can be seen as part of a patchwork of doctrines from a large number

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of areas whose design is built upon the Court's preference for rationalized and professional bureaucracies.

C. Avoiding Perverse Incentives

If the Court has that preference, the criminal procedure cases make some sense. But the due process cases seem strange. They say to the politicized bureaucracy that its activities will be free of constitutional restraints, and to the partially rationalized or professional one that because it has taken a few steps in adopting substantive rules, the Constitution forces it to go further and provide more procedures than it had adopted. This would seem to create an incentive not to adopt substantive rules, which in light of the preference I have attributed to the Court seems perverse. There are a number of reasons why the perversity may only be apparent.

First, it may well be that the process of modernizing bureaucracies — rationalizing or professionalizing them — is pushed by such strong forces that positive law creates legitimate claims of entitlement in all but minor backwaters of the welfare state. I should emphasize here that the rules that create such claims often serve the interests not alone of recipients but of superiors in the bureaucracies who want to control their subordinates. Second, as I will argue in the next section, if the process of modernization goes far enough, the Court will ratify the procedures adopted by a fully modernized bureaucracy by holding that, though process was due under Roth, the process provided was all that the Constitution required.

Third, even old-fashioned bureaucracies must comply with the substantive provisions of the Constitution. But the Court has gone further and has held that when such bureaucracies violate the Constitution they may be required to do more than modernized ones must do to make up for their deficiencies. Hutto v. Finney was a late stage in protracted litigation challenging as "cruel and unusual punishment" the dreadful conditions in the Arkansas prison system. The trial court had directed that various changes be made in the system. The Supreme Court had before it only one part of that comprehensive order, a direction that no prisoner serve longer than 30 days in punitive confinement. The Court recognized that 30 days was not an unusually long period for punitive confinement in the abstract. But it expressly stated that the remedial order was appropriate in the context of the

9 It seems to me significant that immediately after the Roth decision the Regents of the University of Wisconsin adopted a detailed code establishing numerous procedures for notice and administrative review of decisions not to renew contracts. They did so not because the Constitution required them to, but because the University had grown so large that rationalization of employment procedures was necessary if the University was to operate smoothly, and because the professoriate at the University was disturbed at the Supreme Court's endorsement of the Regents' claim that they were free to act arbitrarily. The desire to rationalize employment procedures also lies behind the willingness of sophisticated university administrators to deal with faculty unions. Cf. Stone, The Post-War Paradigm in American Labor Law, 90 YALE L.J. 1509 (1981).
Arkansas case, precisely because the system was so terrible before the courts acted. We might test the implications of Hutto by comparing Arkansas and a hypothetical neighboring state. In Arkansas prisoners cannot be placed in punitive confinement for more than 30 days. In the neighboring state prisons are minimally decent, and have a rule allowing 60 or 90 days in punitive confinement. Hutto implies that a challenge to that rule would fail. Prison administrators in the neighboring state can therefore do things that those in Arkansas cannot. That occurs solely because the Arkansas bureaucrats had not exercised sufficient control over their prisons. Hutto thus provides incentives to modernize in order to have the freedom accorded administrators of modern prisons but denied those of retrograde ones.

Finally, there are two important doctrinal devices that provide incentives to modernize. The first gives incentives to depoliticize the bureaucracy, the second incentives to rationalize it.

During the 1820s and 1830s Andrew Jackson and his political allies created the American spoils system, in which government jobs down to the lowest level were given to political supporters of those in power. After the Civil War, middle class reformers, concerned in part over the inefficiency of the spoils system and in part over the fact that new political forces dominated by immigrants had taken over the system, fought to establish a professional civil service. Government jobs were to be allocated on the basis of merit, and civil servants would be protected against dismissal on the basis of their political affiliations. Almost a century later the Supreme Court discovered that this program was part of the Constitution. In Elrod v. Burns the newly elected Republican Sheriff of Cook County, Illinois, dismissed a number of deputies because they were Democrats. A divided Supreme Court held that such patronage dismissals violated the first amendment: Political affiliation could not be used as a ground for governmental action of that sort. It could justify patronage dismissals of policy-making bureaucrats, though that class might be narrowly defined, but not of ordinary street level bureaucrats. The Court suggested that political affiliation might be a permissible basis for initial appointment to a street level position, which of course gives those temporarily in power an incentive to create new bureaucracies. But Elrod removes adherence to

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11 In addition, judges developing plans to remedy unconstitutional conditions are likely to look to professional standards such as those developed by the American Correctional Association. Such standards provide ready-made criteria in areas with which the judges may not be familiar. Hutto and related lower-court cases, e.g., Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1980); Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977), imply that it is within the trial court’s discretion to require that those standards be met. Yet failing to meet any individual standard does not itself violate the Constitution. See text accompanying notes 158-59 infra.


a common political program as a mechanism by which superiors can control the exercise of discretion by subordinates in an established bureaucracy.\textsuperscript{9} As soon as the "outs" displace the "ins," other methods of control — rules or professional norms — will have to be developed. And indeed it is probably significant that \textit{Elrod} arose in Cook County, where the dominance of a single party had prevented that displacement for many years; elsewhere the rotation of "ins" and "outs" probably made it almost essential to depoliticize the bureaucracy so that it could operate smoothly during and after political transitions.

The "ins" in superior positions might be uncomfortable even with \textit{Elrod}'s limited concession to political appointments, for they have no guarantee that their appointees will continue to adhere to what might well be a political program that changes as different factions displace each other. \textit{Elrod} depoliticizes decisions to fire street level bureaucrats. It would be well, from the point of view of superiors, to depoliticize the daily operation of the bureaucracy too. This is done through statutes like the Hatch Act, which severely limit the kinds of political activity in which street level bureaucrats can engage. Under the Hatch Act and its state counterparts, such bureaucrats cannot hold party office, raise money for parties, or run for office under a party label. The Supreme Court has held that these restrictions on political activity do not violate the first amendment rights of street level bureaucrats.\textsuperscript{9} Its rhetoric suggests that the restrictions are not only permissible but are also wise and sensible attempts to depoliticize the bureaucracy:

[The decision] confirm[s] the judgment of history...that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.\textsuperscript{11}

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.\textsuperscript{12}

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\textsuperscript{9} It also removes a more obvious but less interesting mechanism of control: removal pursuant to the unchecked discretion of a superior. The threat of a lawsuit based on a claim that the removal was motivated by impermissible political concerns will induce superiors to develop a more rule-oriented system.


\textsuperscript{11} \textit{id.} at 557.

\textsuperscript{12} \textit{id.} at 564.
A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.\footnote{Id. at 566.}

Taken together, \textit{Elrod} and the Hatch Act cases give bureaucratic superiors good reasons to try to regulate the behavior of subordinates by rules and professional norms.\footnote{Under Pickering v. Board of Educ., 391 U.S. 563 (1968), and Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1978), subordinates can complain both inside and outside the bureaucracy about their superiors' substantive policies. But apparently the Constitution does not require that they be allowed to complain about personnel policies or to organize co-workers to oppose the superiors. \textit{See} Connick v. Myers, 103 S. Ct. 1684 (1983). That is, subordinates cannot engage in "office politics," thus giving their superiors an even stronger hand in their control.} They thereby offset to some extent the pressure \textit{Roth} exerts in the opposite direction.

If the civil service cases provide incentives to depoliticize bureaucracies, another set provides incentives to regularize their operations. A federal civil rights statute says that people whose constitutional rights have been taken from them by state officials may recover money damages from those officials. As the Supreme Court has developed the law of damages, two elements make it sensible for officials to follow routines. First, individual bureaucrats will have to pay damages only if they did not act in good faith.\footnote{Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).} "Good faith" is defined as a reasonable belief that the actions were constitutional. A bureaucrat would be well-positioned to assert the good faith defense if he or she had acted in accordance with pre-established rules, especially if those rules had been cleared with legal counsel to the agency.\footnote{Under Monell v. Department of Social Services, 436 U.S. 658 (1978), and Owen v. City of Independence, 445 U.S. 622 (1980), the city or agency—that is, the taxpayers—might be liable to pay damages for adopting unconstitutional rules. Such liability indirectly affects bureaucrats' incentives to adopt better rules to the extent that they fear the consequences of a taxpayer revolt.} Second, a person whose rights were violated must show that the violation had caused his or her injuries. For example, \textit{Mt. Healthy School District v. Doyle} involved a teacher who had been fired.\footnote{429 U.S. 274 (1977).} The teacher was a union activist who had criticized the school board quite vociferously. But there also was evidence that he physically abused some students and disobeyed reasonable orders given him by his principal. The Court held that he could recover damages for the firing if he showed that his union activities, protected by the first amendment, had been one reason for the firing, but that the school board would win if it showed that he would have been fired anyway because of his disruptive behavior. In the latter instance, the violation of rights would not have caused any injury. This rule of causation gives bureaucrats reasons to develop "paper trails" that will allow them to establish the "it would have happened anyway" defense. An important part of a paper trail...
will be a set of procedures that the bureaucrat followed before acting. Further, the defense will be easier to establish if the bureaucrats have at hand a set of previously developed substantive standards against which the subordinate’s performance can be measured.

The Supreme Court undoubtedly does not think of these various rules as providing incentives to depoliticize, rationalize, and professionalize the bureaucracies of the welfare state. Nor is it important for my argument to establish that bureaucracies respond to these, or any other, incentives. Rather, these rules help fill in the patch-work that is the Court’s vision of the welfare state bureaucracy. In that vision, the Constitution does not disrupt the operation of bureaucracy, and may even facilitate it, because bureaucracy is already depoliticized and rationalized or professionalized.

D. What Process Is Due?

*Goldberg v. Kelly*98 decided two issues. It held that due process was required when a state sought to terminate public assistance payments, and it defined the process that was due. The state in *Goldberg* had a formal system of appeals, where the beneficiary could present oral evidence and cross-examine witnesses, that could be taken after assistance payments were ended. The issue in *Goldberg* was therefore what the state had to do before ending the payments. Under state law the recipient was given notice of the reasons for termination at least seven days before the payments were to end, and could submit a written statement about why the payments should continue. Although the Supreme Court said that “the pre-termination hearing need not take the form of a judicial or quasi-judicial trial,”99 it actually imposed almost all of the characteristics of such trials. The hearing did not have to produce “a complete record and comprehensive opinion,”100 but the beneficiary had to have “an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally,”101 with the assistance of an attorney “if he so desires,”102 and the impartial decision-maker should state the reasons for the decision.103 Just as the notion of new property rested on an appeal to tradition in defining what interests are important, so here the Court reverted to the only model at hand, the traditional judicial trial, to define the characteristics of the process that was due.

The traditional trial provided a checklist that the Court could work through in any new property situation. Thus, in *Morrissey v. Brewer* the Court considered the procedures required to revoke parole. It analogized the preliminary decision to the pre-termination hearing in *Goldberg*, and required a decision “by someone

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100 Id. at 267.
101 Id. at 268.
102 Id. at 270.
103 Id. at 271.
not directly involved in the case,”¹⁰⁴ notice, and the opportunity to appear in person and present evidence.¹⁰⁵ At the revocation hearing itself, more elaborate procedures were required. Again the two-step of disclaiming reliance on the judicial trial and then requiring it occurred:

We cannot write a code of procedure.... Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. We emphasize that there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense.¹⁰⁶

In both Goldberg and Morrissey the Court said that it was reluctant to require judicial trials because, as the latter put it, “creat[ing] an inflexible structure...[would] impose a great burden” on the state’s new property and liberty systems. That is precisely the motivation that led to the adoption of Roth’s entitlement theory. And just as Roth limited the scope of the due process clause out of concern for stifling the development of new property systems, so Goldberg’s reliance on the judicial trial as a model succumbed to pressures arising from the same concerns. As the Court put it in Parham v. J.R.:

As the scope of governmental action expands into new areas creating new controversies for judicial review, it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems. The judicial model for fact-finding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise.¹⁰⁷

These pressures led to Mathews v. Eldridge.¹⁰⁸ Eldridge received disability benefits from the Social Security system. In 1972 he filled out a questionnaire regarding his present medical condition. On receiving Eldridge’s answers, the agency administering the benefits obtained reports from his doctor and from a psychiatric consultant. This information led the agency to decide that Eldridge was no longer disabled. It notified him of its proposed termination of benefits, which he disputed in a letter. The agency then made the termination of benefits final. Eldridge challenged the agency’s procedures, claiming that Goldberg required a pretermina-

¹⁰⁵ Id. at 485-87.
¹⁰⁶ Id. at 488-89.
¹⁰⁷ 442 U.S. 584, 608 n.16 (1979).
tion evidentiary hearing. In an opinion written by Justice Powell, the Supreme Court distinguished *Goldberg* on a number of grounds: Disability benefits are not based on need, and their termination would therefore not drive former recipients over the edge of subsistence-level income; disability decisions are based primarily on medical evidence usually contained in written materials not subject to serious challenges to credibility that in-person presentation and cross-examination can expose. *Eldridge* repeatedly deprecated *Goldberg* as the “only” new property case relying on the trial model.  

It adopted as an alternative the following test:

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\text{Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.}
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In applying this test, the Court first described “the elaborate character of the [existing] administrative procedures.” The private interest was not, as in *Goldberg*, avoiding destitution. Given the statutory standards, Eldridge was — at least according to the agency — able to work, but even if the agency was wrong, Eldridge could rely on “private resources [and] other forms of government assistance” if the family fell below the subsistence level. The private interest, “in view of these potential sources of temporary income,” was not enough to justify “depart[ing] from the ordinary principle...that something less than an evidentiary hearing is sufficient....” The existing procedures allowed for careful evaluation of the medical evidence, “a more sharply focused and easily documented decision than the typical determination of welfare entitlement,” which the Court said — without explaining why — would utilize “a wide variety of information.” The Court also deprecated the significance of the high rate of reversal of decisions to terminate disability benefits: “Bare statistics rarely provide a satisfactory measure of the fairness of a decision-making process,” and were especially suspect here because reversals could be based, not on errors at the initial stage, but on new evidence.

*Eldridge* adopts an explicitly utilitarian test of due process. I will return to the widely made suggestion that the test is defective because it ignores values other

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105 *Id.* at 333, 340.
106 *Id.* at 335.
107 *Id.* at 339.
108 *Id.* at 342.
109 *Id.* at 343.
110 *Id.*
111 *Id.* at 346.
112 *Id.* at 346-37.
113 *Id.* at 347.
114 *Id.* at 346.
115 *Id.* at 346.
116 *Id.* at 346.
than utility. For now I want to emphasize two things. First, the utilitarian test is entirely consistent with the essentially technocratic vision of bureaucracies that, I have argued, the Court holds. Second, the traditional model of the judicial trial provided the Court with some guidance in deciding what process was due. One would begin with that model and ask whether particular departures were justified by the circumstances. For example, the Court held that the right to confront adverse witnesses could be limited in prison disciplinary hearings where there was reason to think that the witnesses might be physically harmed by retaliation.\footnote{6} In contrast the utilitarian approach gives the Court no such guidance.\footnote{9} As my discussion of Eldridge suggests, the Court is then driven to seat-of-the-robes assessments of the way the world operates and would operate if things were different. These assessments lead in turn to a pair of characteristic judgments: that the professionals making the street level decisions can be trusted, and that the professionals in charge of the system as a whole can be trusted to adopt procedures that the courts should acknowledge as all the Constitution requires.

\textit{Heckler v. Campbell} illustrates the latter point.\footnote{10} The Social Security Administration operates the federal disability system. Under that system people are defined as disabled if they have medical or physical impairments that make them unable to perform substantial gainful work "which exists in the national economy."\footnote{11} The Administration processes an enormous number of claims. Prior to 1978 it relied on evidence introduced at hearings to determine whether work existed in the national economy for people with the disabilities the claimants had. "Although this testimony often was based on standardized guides, . . . vocational experts frequently were criticized for their inconsistent treatment of similarly situated claimants."\footnote{12} In 1978 the Administration replaced the use of testimony with a set of guidelines in the form of a grid. After identifying the claimant's disability, age, education and work experience, the administrative law judge consults the relevant box in the grid to find out whether there are jobs in the national economy for such a person. The Supreme Court upheld the grid as a reasonable form of rule-making regarding "general factual issue[s]."\footnote{13} The grid introduced uniformity in an overburdened system, and, notably, rationalized the behavior of administrative law judges in accordance with expert determinations made at higher levels of the bureaucracy.

Notably, and consistent with the general theme of this Article, the Court's judgments play out as deference to professionals in bureaucracies. They are not expressed, as a general theory of judicial restraint might suggest, as deference to

\footnotesize{\begin{itemize}
\item \footnote{6} Wolff v. McDonnell, 418 U.S. 539 (1974).
\item \footnote{9} Cf. Mashaw, Three Factors, supra note 117, at 55 (analogous problem in justifying departures from traditional model where there is no guidance as to which traditional procedures are apposite to the novel problem).
\item \footnote{10} 103 S. Ct. 1952 (1983).
\item \footnote{11} 42 U.S.C. § 423(d)(1)(A) (1976).
\item \footnote{12} 103 S. Ct. 1952, 1954.
\item \footnote{13} Id. at 1958.
\end{itemize}}
the will of the majority as embodied in the decisions of the representative legislatures that established the bureaucracies that adopted the procedures in issue. Obviously the chain between the electorate and the rules is far too long to make a generalized theory of judicial restraint at all plausible.124 The imagery of professionalism, not that of democracy, makes more sense of the situation.

I turn now to examine three areas in which we can see, with varying degrees of clarity, the link between the utilitarian test of Eldridge and deference to professional judgments.

1. Impartial Decision-makers

As we have seen, Arnett v. Kennedy125 involved the dismissal of an employee by the very person he had charged with giving a bribe. Justice Powell rejected the positive law approach pursued by Justice Rehnquist, but agreed that the dismissal was constitutional. Anticipating Eldridge's utilitarian test, Justice Powell balanced the interests of the government and the employee. He found it easy to conclude that a Goldberg-type pretermination hearing was not required. In a footnote he disposed of the problem of partiality by invoking "practical considerations": "In most cases, the employee's supervisor is the official best informed about the 'cause' for termination" — a curious way of characterizing the dispute between Kennedy and his supervisor.126

Schweiker v. McClure is more instructive, perhaps because it explicitly used the Eldridge test.127 Private insurance companies administer part of the Medicare system by processing payments received from the government to cover 80% of the cost of most physician services. If the insurance company refuses to pay part of a claim — for example because the service was not medically necessary or because the charge was unreasonable — the patient, who will have to pay out of his or her own pocket, may appeal to a hearing officer chosen by the insurance company and paid by the government. Although it agreed that the hearing officers "serve[d] in a quasi-judicial capacity"128 and so had to be impartial, the Supreme Court "start[ed], however, from the presumption that the hearing officers...are unbiased."129 That presumption was not overcome by the mere fact that they were chosen by the insurance companies, because the companies had no financial interest in the outcome of appeals: Either the government or the patient would pay, but not the company. This despite the facts that five out of seven of Blue Shield's hearing

124 But see Easterbrook, supra note 6, at 118-19. See also Withrow v. Larkin. 421 U.S. 35 (1975) (upholding power of state examining board to investigate, prosecute and decide cases of professional misconduct; combination of functions does not violate due process; issue is "substantial" but wide variety of solutions is necessary given "the incredible variety of administrative mechanisms in this country").
126 Id. at 170 n.5.
128 Id. at 195.
129 Id.
officers were former or current Blue Shield employees, and that another hearing officer had been employed by the insurance industry for forty-two years. One does not have to hold a very strong theory about how class interests are formed to believe that people like that are unlikely to be impartial as between patients and the government, in an era of concern over containing the cost of health care lest escalating costs threaten the stability of the entire system from which insurance companies have, perhaps to their surprise, profited handsomely. As we will see again, presumptions like that in *McClure* rest on assessments of social reality. Here the assessment is a relatively undifferentiated sense that people in positions of bureaucratic authority are trustworthy. Later the sense will be refined to take account of professionalism.

2. Evidence and Cross-Examination

Another disability case, *Richardson v. Perales*, makes the professionalism of bureaucratic decision-makers important.130 Perales applied for disability benefits. After he filed his claim, the agency arranged for an examination by an orthopedic specialist, whose report, according to the Court, "was devastating from [Perales'] standpoint." The report said that Perales was "obviously holding back" and "exaggerat[ing] his difficulties." Relying on this report and rejecting evaluations by Perales' own doctor, the agency denied Perales' claim. When Perales requested reconsideration, the agency arranged for an examination by a psychiatrist, who found that Perales had a paranoid personality but was not disabled by a psychiatric illness. At Perales' request, a hearing was held. The hearing examiner considered these medical reports over Perales' objection that he had no opportunity to cross-examine the doctors. The examiner called the reports, and others introduced by Perales, "objective medical evidence" and concluded that Perales was not disabled. Justice Blackmun's opinion for the Supreme Court found that it did not violate due process to rely on these documents to deny the claim. The Court enumerated "a number of factors" to support its conclusion. The first was that the reports were prepared by doctors who examined Perales. Although some of the doctors were paid by the agency, the Court could not "ascribe bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses."131 Their reports were detailed and rested on standard procedures. Further, to require oral testimony by the doctors would, in light of the size of the disability system, "be a substantial drain...on the energy of physicians already in short supply."132

130 *Id.*

131 *Id.* at 403.

132 *Id.* at 406. *See also* Califano v. Yamasaki, 442 U.S. 682 (1979) (oral hearing required when claimant requests that recoupment of overpaid benefits should be waived because claimant was not at fault and recoupment would be "against equity and good conscience").
3. Counsel

*Lassiter v. Department of Social Services* shows how seat-of-the-robbers judgments of fairness get made. Lassiter's son William had been placed in foster care in 1975 after a court found that she had not provided him with proper medical care. A year later Lassiter was convicted of second-degree murder; the death had occurred during a fight between her mother and the victim, in which Lassiter joined. While she was in prison, the Department filed a petition to terminate Lassiter's parental rights because she had not had contact with William since 1975 and had not tried to strengthen her relationship with him or plan for his future. A hearing was held, at which the Department was represented by a lawyer and Lassiter was not. The Department presented one witness, who described Lassiter's case by relying on agency records, and repeated comments about Lassiter that her neighbors had made. The judge offered to allow Lassiter to cross-examine, but Lassiter, unfamiliar with the rules of evidence, found it impossible to do so. Lassiter and her mother testified that the latter was willing to raise William. During the hearing the trial judge was occasionally impatient with Lassiter's labored efforts to show that she had indeed planned for William's future.

Lassiter claimed that she should have been provided counsel at the termination hearing. Rejecting that claim, the Court divided its analysis into three steps. First, it reviewed the precedents on the right to counsel and concluded that an unconditional right existed only if the litigant might lose his or her physical liberty at the conclusion of the hearing. Second, it evaluated the general class of termination cases in light of *Eldridge* and the presumption against a right to counsel. The parent had a "commanding" interest in retaining parental rights and avoiding criminal charges predicated on the activity giving rise to the proceeding; the state had an interest in the child's welfare and so "share[d] the parent's interest in an accurate and just decision"; the state's interest in keeping costs down by not paying counsel was legitimate but not very strong; finally, the issues in termination proceedings were sometimes complex, and often had to be developed through the testimony of parents "with little education...thrust into a distressing and disorienting situation." Sometimes these interests would come out on balance to favor the appointment of counsel, but they would not always be "distributed" so that the balance came out that way. Thus there was no unconditional right to counsel in termination cases. Rather, the issue was to be decided on a case-by-case basis.

If this analysis is taken seriously, *Eldridge* eliminates the possibility that the Constitution requires that any procedures, not just counsel, be provided in an entire class of cases. For it will never be true that the *Eldridge* factors are distributed in every case in any class so that the balance inevitably tips in favor of providing

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134 Id. at 27.
135 Id. at 30.
136 Id. at 31-32.
the procedure at issue. This point is driven home by the rhetorical skill with which Justice Stewart's opinion for the Court avoided the usual trap of balancing tests, into which *Eldridge* itself fell, of manipulating the characterization of interests to determine the result. Instead the opinion gave maximum weight to the parent's interest and minimized the state's. If an unconditional right cannot be justified under these circumstances, it never could be.\(^{137}\)

But the best, from one point of view, was yet to come. The Court's third step was to analyze whether in the case before it Lassiter should have been provided counsel. It concluded that "the trial court did not err in failing to appoint counsel."\(^{138}\) The case was procedurally and substantively simple. Hearsay evidence was admitted, and some arguments were not developed as well as a lawyer might have developed them. But the arguments would have failed because the contrary evidence, though controverted, was substantial.\(^{139}\) Two points are worth making in conclusion. First, by requiring only case-by-case decisions, the Court placed substantial reliance on the trial courts, just as it did in *Illinois v. Gates*. Second, by speaking of the state's interest in child welfare and by treating the social worker's evidence as substantial, the Court acted on an implicit understanding that child welfare bureaucracies operate as professional norms say they should.

E. *The Consequences of Utilitarian Balancing in a Technocracy*

I do not want to draw this picture too starkly. Of course not every due process case since *Eldridge* has relied explicitly on the view of bureaucracies as professionalized, nor has a strong version of that view been implicit in every case. Further, some of the references to professional norms are undoubtedly a little quirky. For example, *Perales*' emphasis on trusting doctors rather obviously stems from Justice Blackmun's well-known sympathy with doctors, derived from his experience as counsel to the Mayo Clinic. But the general pattern is clear enough to warrant identifying it as a significant part of the Court's general view of the world.

That pattern leads to decisions that whatever due process requires, it was provided by the agency. That is not because utilitarian balancing is such a complicated process as to be beyond the competence of the courts but within the competence of majoritarian legislatures. Rather, the agency's procedures satisfy due process because the agency is a professionalized bureaucracy. Notice how these cases combine with the *Roth* line of cases to yield the conclusion that no procedures are required beyond those chosen by the agency: Either there is no entitlement and therefore no right to any additional process, or there is an entitlement protected by the procedures already provided. If the approach to the problem through positive law was foregone explicitly, it was followed in another form.

\(^{137}\) *See id.* at 49-51 (Blackmun, J., dissenting).

\(^{138}\) *Id.* at 33.

\(^{139}\) *Id.* at 32-33.
I will conclude this section by discussing briefly two cases that drive home its point. The Organization of Foster Families for Equality and Reform (OFFER) objected to the procedures by which New York removed foster children from their foster families.\textsuperscript{4} Technically the state children's agency had legal custody of foster children; it contracted with foster parents for day-to-day supervision of the children. The agency had complete discretion to remove a child from a foster home, which usually meant transferring the child to another foster home. All the agency had to do was to give the foster parents ten days notice and an opportunity for a conference at which they would be advised of the reasons for removal and given a chance to explain why they believed the child should not be removed. A full adversary hearing was provided after removal. In addition, foster parents could petition the Family Court to review the agency's removal decision before it took effect.

Justice Brennan’s opinion for the Court first struggled with the \textit{Roth} issue, which was particularly acute because the foster parents had not received benefits from the agency in the usual way, but had instead signed contracts into which the procedural provisions of the statutes could be read as implied terms of the agreement. Yet foster children often stayed with one set of foster parents long enough to develop the ties of affection expected in biological families, ties which, as \textit{Santosky} and \textit{Lassiter} show, create liberty interests requiring procedural protection. That indeed posed an additional problem, because the biological parents had liberty interests too, often conflicting with those of foster parents. Justice Brennan found it unnecessary to resolve the \textit{Roth} question: assuming that foster parents had protected interests, he concluded that the agency procedures were constitutional under the \textit{Eldridge} test. A footnote stated, “In assessing the likelihood of erroneous decisions by the agency in the absence of elaborate hearing procedures, the fact that the agency bears primary responsibility for the welfare of the child and maintains, through its case-workers, constant contact with the foster family is relevant.”\textsuperscript{4} The natural parents and children could be excluded from the hearing “since the foster parents and the agency, through its caseworkers, will usually be most knowledgeable about conditions in the foster home.”\textsuperscript{142}

Finally there is \textit{Parham v. J.R.}, in which the Court rejected claims that Georgia's procedures by which parents and state agencies with custody over children committed them “voluntarily” to mental institutions were unconstitutional.\textsuperscript{143} Under state law guardians file applications for hospitalization. The child is observed, and if the superintendent of the hospital decides that the child is mentally ill, the child may be admitted. Although not required by state statutes, most of the institutions conducted periodic reviews of each child to determine whether institutionalization

\textsuperscript{141} Id. at 850 n.58.
\textsuperscript{142} Id. at 851.
\textsuperscript{143} 442 U.S. 584 (1979).
should continue. The reviews were done by the medical and professional staff; less frequent reviews were conducted by a different set of staff personnel.

Chief Justice Burger's opinion for the Court is replete with references to the use of "medical knowledge...to ameliorate the human tragedies of seriously disturbed children" and the like. It applied the Eldridge test. The child had a substantial liberty interest and a weaker one in avoiding "adverse social consequences" from being labelled mentally ill: "What is truly 'stigmatizing' is the symptomatology of a mental or emotional illness." The parents had a long-recognized interest in exercising authority over their children: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity.... Historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."

The state's interest was in providing facilities to those in genuine need without imposing additional procedural barriers that might deter some from seeking assistance.

But for our purposes the most interesting part of the opinion occurs when it discusses what procedures are required. A "neutral factfinder" had to determine whether the child was mentally ill, taking into account all available evidence, and the continuing need for commitment and to be reviewed periodically. "[A] staff physician will suffice," and "informal, traditional medical investigative techniques" could be used. "What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case." Although doctors were fallible, "the shortcomings of specialists can [not] always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge...."

Some had charged that parents often "dumped" unruly children into state institutions. But "[i]t is unrealistic to believe that trained psychiatrists, skilled in eliciting responses, sorting medically relevant facts, and sensing motivational nuances will often be deceived...." The Court acknowledged that medical decision-making was not "error-free," but was satisfied that on balance "an independent medical decisionmaking process" protected children enough to satisfy due process. It summarized its views: "The State, through its mental health programs, provides the authority for trained professionals to assist parents in examining, diagnosing, and treating emotionally disturbed children. Through its hiring practices, it provides well-staffed and well-equipped hospitals and... conscientious public employees to implement the State's beneficial purposes."

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144 Id. at 599.
145 Id. at 601.
146 Id. at 602.
147 Id. at 607.
148 Id. at 609.
149 Id. at 611.
150 Id. at 613.
151 Id. at 616.
With Parham v. J.R. we near the point at which professional behavior with the requirements of the Constitution coincide. Georgia’s procedures were adequate precisely because they committed decisions to professionals.152

V. PROFESSIONAL NORMS AND SUBSTANTIVE LAW

So far I have discussed the near-merger of professional norms and constitutional rights in the setting of procedural due process. Sometimes the Court has gone farther and adopted professional norms as substantive rules of constitutional law.

There is a hint of this in Parham v. J.R. The Court devoted much of its analysis to balancing the Eldridge factors, which included the interests of parents. But the litigants there also included a class of children who were wards of the state. The majority held that this did not affect the outcome of the balance. Although no adult might care deeply about the children, there was a statutory presumption that the state acted in the child’s best interest. This was buttressed by the “extensive written records that are compiled about each child while in the State’s custody.”53 Thus, social workers become just like parents.

Another mental health case is more explicit. Nicolas Romeo, a profoundly retarded man, was involuntarily committed to a state institution for the retarded.54 At the institution he was injured many times, both by other residents and by his own actions. Eventually he was transferred to the institution’s hospital, where he was physically restrained for part of each day. Romeo claimed that involuntary commitment without appropriate treatment and under circumstances leading to both direct physical harm and deterioration of his mental condition was unconstitutional. A unanimous Supreme Court agreed in substantial measure with Romeo. It found his claims to safety and freedom of movement easy, but had more difficulty with his claim to treatment, and concluded that his right extended to training to ensure safety and freedom from undue restraint. The Court also noted that Romeo’s interests had to be balanced against state interests, for example in restraining him in order to avoid injury to other residents. In striking that balance the Court held that the Constitution requires “deference to the judgment exercised by a qualified professional.”55 If such a professional in fact exercised professional judgment in deciding to restrain him, Romeo’s rights were not violated. This would limit “interference by the federal judiciary with the internal operations of these institutions....”56 A professional’s decision violates a resident’s rights “only when the decision...is such a substantial departure from accepted professional judgment,

152 See also Barry v. Barchi, 443 U.S. 55 (1979) (summary suspension of horse trainer by state racing board, based on test revealing drugs in horse’s blood, is constitutional, but prompt post-suspension hearing required).
153 442 U.S. at 618-19.
155 Id. at 322.
156 Id.
practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.**157 Here the Constitution requires what professionals think appropriate.

More precisely, it requires that professionals exercise professional judgment. The psychiatrists in *Romeo* would not be liable simply because their decisions were at odds with those recommended by a majority of psychiatrists. Only decisions so extreme as to be unprofessional give rise to liability. Similarly, the Court has rejected the contention that a prison violates the Constitution by imposing "cruel and unusual punishment" simply because it fails to comply with standards developed by the professional association of prison administrators.**158 Yet neither of these rules repudiates professionalism as a constitutional norm. They refuse to impose the norms established by an external body but still treat the psychiatrists and jailers at the institutions involved in the litigation as professionals, not political hacks.**159

The Supreme Court’s rules in abortion cases also incorporate the judgments of professionals and indeed of their associations. The basic abortion decisions held that states had only a narrow authority to protect the health of the woman who chose to have an abortion.**160 They allowed the states to do so, in 1972, by requiring that abortions in the second trimester of pregnancy be performed in hospitals. That requirement was consistent with the positions taken at that time by the American Public Health Association (APHA) and the American College of Obstetricians and Gynecologists (ACOG).**161 Eleven years later the Court considered a ban on second-trimester abortions performed in clinics rather than hospitals.**162 During the intervening years the APHA and the ACOG had changed their positions, and by 1983 found no health purpose served by a hospitals-only requirement.**163 The Court relied heavily on the recommendations of these professional associa-

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**157 Id. at 323. A footnote defined "professional" as "a person competent, whether by education, training, or experience to make the decision...." Id. at 323 n.30. Long-term decisions should be made by people with medical or nursing degrees or with appropriate training. Day-to-day decisions could be made by staff under the supervision of professionals. Id.

**158 Rhodes v. Chapman, 452 U.S. 337 (1980). One reason to reject that contention was discussed by Justice Rehnquist in staying an order to remedy prison conditions in *Atiyeh v. Capps*, 449 U.S. 1312 (1980): professional standards are to some extent efforts by the profession to secure resources beyond those available through the usual political process. Prison administrators who wish to upgrade their institutions can use such standards as clubs to beat their governors with, or to shame the governors into increasing the prison budget.

**159 Where professional judgment is constrained by politicians’ failure to provide resources, *Romeo* holds that psychiatrists who do not exercise professional judgment are not individually liable for damages. 457 U.S. at 323. Here the bureaucracy is seen, in one version, as a professional agency unfortunately at the mercy of external political forces, and in another version, as an agency comprised of deskilled professionals. See infra text accompanying notes 164-65. If the psychiatrists themselves were political hacks, that is, if the bureaucracy had been a politicized agency, they would be individually liable.


**162 Id.

**163 Indeed, the ACOG had changed its position after the Akron ordinance had been passed and a challenged to its constitutionality initiated. Id. at 2496.
tions in finding unconstitutional a hospital-only ordinance that fit the requirements the Court had laid down just eleven years before.

Again I must emphasize that I am not offering a universal explanatory theory for these cases. I have in this section tried to identify a theme, latent in some cases and openly expressed in others, of deference to professional judgments. The material to this point strongly suggests that the Court has a vision of the welfare state in which professional and rationalized bureaucracies are the norms, both in the sense that most bureaucracies are like that and in the sense that bureaucracies ought to be like that. It remains to reflect on that vision.

VI. The Repoliticized Bureaucracy as an Alternative

As we will see, many commentators find the Court's vision unattractive, as I do too. But the first point to be made is simpler. Some of the normative force behind the Court's vision comes from the fact that the vision evokes a sense that things are really like that, and that the law has to accommodate reality. But in fact things are not like that at all. The bureaucracies of the welfare state are indeed heavily rule-governed, but operate without substantial regard to professional norms. The Court has thus developed a constitutional law for an imaginary society and has sought to persuade us that the imaginary world is our own.

One theme resounds through the literature on street-level professionals in bureaucracies. They are regularly constrained by inadequate resources, the incredible numbers of decisions they are required to make, the complexity of the decisions were professional norms honored, by routinely processing cases and by trying to forget about doing the job they were taught to do in school. Their jobs have become deskilled and they have been made into proletarians. Mental health professionals in public hospitals are reduced to administering drugs, and retain their connection to their professional roots by calling doing nothing at all, which is all they can do, "environmental therapy." Indeed the Court in *Romeo* recognized this when it held that a professional could not be held liable for monetary damages where his or her failure to exercise professional judgment resulted from inadequate resources. These conditions characterize what social workers do in public assistance agencies, what teachers do in schools, and even what police officers do in keeping the peace. The public law of the welfare state bureaucracy, as the Court has constructed it, offers us a way of thinking about bureaucracies that those in and affected by them would find alien.

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166 457 U.S. at 323.

And yet on another level the image the Court offers us is entirely accurate. On the level of immediate experience we know that bureaucracies are shot through with deskilled employees, that superiors make decisions based on personalities, that beneath the surface of bureaucratic rules lies a dense network of personal associations that is what really lets the bureaucracy operate. But on the level of cultural understanding we believe that rationality and professionalism characterize modern society. When we translate that understanding into systematic theories we find ourselves drawn to such aspects of utilitarianism as cost-benefit analysis. We have seen that utilitarian ways of thinking pervade the law of due process. The Court’s image of society seems accurate to the extent that we deny our immediate experience and embrace our cultural understandings.

A. The Participatory Alternative

Important commentators regard the utilitarian and technocratic way of thinking as unattractive. Jerry Mashaw and Frank Michelman have offered an alternative in which the provision of due process is a value in itself.\textsuperscript{148} This alternative treats procedures as giving people chances to participate in the operation of the institutions that affect them. To Mashaw, participation recognizes the dignity and autonomy of the individual; to Michelman, it is a form of association that promotes the values of fraternity. Neither version of the participatory alternative is satisfactory.

1. The Utilitarian Version

Mishelman and Mashaw could defend their alternatives as rectifying an omission in \textit{Eldridge}'s utilitarianism.\textsuperscript{149} \textit{Eldridge} places in the balance the individual's interest in receiving the benefits due him or her. A complete utilitarian test would recognize that individuals have an interest as well in being treated in ways that they believe are fair. The idea is that people who lose (and those who win) will feel better after losing (or winning) if they believe that the results were generated by a process in which they had a fair shot at winning (or losing). These feelings have to be placed in the balance too.

As a formal statement of what utilitarianism requires this seems correct. That it will have any effect on outcomes under \textit{Eldridge} is, I think, questionable. It seems likely that the interest in winning will usually be overwhelmingly larger than the interest in good feeling. I will concede that occasionally losers will walk away


\textsuperscript{149} See, e.g., Laycock, \textit{supra} note 29, at 885, 887 ("sense of unfair treatment"); Mashaw, \textit{Three Factors}, supra note 117, at 48. This follows Mashaw's criticism of the Court's balancing of the interests it did identify. \textit{Id.} at 38-45. See also Michelman, \textit{supra} note 66, at 147. Mashaw, \textit{Dignitary Theory}, \textit{supra} note 168, argues that the premises of liberal political theory support only an extremely thin theory of participatory governance. \textit{See, e.g., id.} at 887, 922, 926-29.
feeling less bad if they lost after a full hearing than they would have if they had lost after a summary proceeding. But my guess is that they will not feel much "less bad," and I doubt whether winners will feel worse winning in a summary proceeding. Thus the increment that the participatory interest contributes to the Eldridge balance seems to me likely to be small.

Further, this account trades on an intuition that is misplaced here. Perhaps a utilitarian could get somewhere by including the participatory interest in deciding whether process was due or not. But the issue in Eldridge is not the "all or nothing" one; it is the marginal task of adding one or two new procedures to an existing scheme. Lassiter shows how implausible it is to believe that the utilitarian has to worry about losers walking away muttering to themselves, "If only I had been allowed to cross-examine—but not with a lawyer at my side—...." In this sense Goldberg v. Kelly may have been right: if you are going to provide process, you are going to have to go all the way.

Utilitarian calculations could in principle yield "all or nothing" results: Unless everything is provided, the weight added by the participatory interest is too small to make a difference. Mashaw clearly wants to be able to make smaller moves, and Michelman, with his emphasis on associational values, explicitly prefers to be able, in appropriate circumstances, to require something other than summary procedures but different from a full judicial trial.

In contemporary bureaucracies, however, informal procedures are likely to serve ends other than dignity and association anyway. There is, first, the problem of the "wired" procedure, the one in which the outcome is pre-determined not by "the facts" but by the imperatives of the bureaucracy. Consider prison disciplinary hearings. Guards sometimes — for my purposes it does not matter how often — charge prisoners with violating rules where the rules have not been violated or have been broken in a way that rarely elicits a response. The guards may be hot and tired, or may not like the inmate, or whatever. To keep peace in the prison, superiors must back up the guards and find that punishable offenses occurred. The inmate receives an explanation of the outcome which he knows is false. A utilitarian might think that patent arbitrariness would be better in the circumstances than fictitious fairness. The point here is fairly general. As we have seen, although an "impartial" decision-maker is often required, impartiality does not mean that the decision-maker not be part of a social network that will make him or her sensitive to the bureaucracy's requirements. Not all proceedings are "wired," for sometimes the decision-maker will know that the guard is a bad actor who should not be backed up and will think that other guards ought to be sent a message. And sometimes decision-makers will be far enough removed from the line officers to be able to be truly impartial. But the Constitution seems to require neither arrangement.

In addition, there are what might be called the realities of informality. The

170 See, e.g., Mashaw, Dignitary Theory, supra note 168, at 922, 926-29.
171 Michelman, supra note 66, at 149-53.
Court has come closest to endorsing informal procedures in *Goss v. Lopez*, where it required "less than a fair-minded school principal would impose upon himself...." The principal just had to discuss the incident "informally" with the student shortly after it occurred. One can be fairly confident about what such a discussion would be, given the disparities in power between principal and student. The principal has to back up his or her teachers; young people lack credibility. The message in most instances will be, "Don’t go away mad; just go away." And a utilitarian would be satisfied by that result. This process, which I believe is inevitable in contemporary bureaucracies, is sometimes called "cooling out the mark."

I conclude that building participatory and associational values into the utilitarian calculation does not make it any more attractive: the values are unlikely to alter many results, and whatever changes they produce are likely to serve ends that ought not be served.

2. The Nonutilitarian Version

Michelman and Mashaw could defend their alternatives by treating them as nonutilitarian limits on the results of a utilitarian calculation. I discuss this only briefly, because the obstacles to a successful defense along these lines seem huge. The problem of determining which procedures are nonutilitarian limits on what utilitarian processes arises again, and needs no further discussion. Further, Justice Black pointed out in his dissent in *Goldberg* that procedures are costly. The bureaucracies of the welfare state are doing things: locking up inmates, providing material assistance to some of the needy, and so on. If more procedures are required, less of those things will be done. And many of them serve nonutilitarian ends. It is not obvious how one could properly resolve the conflict between doing more nonutilitarian stuff and providing more nonutilitarian procedures.

But the most fundamental difficulty is that under no sensible moral theory is process in itself a value. To that extent Eldridge’s instincts were correct. The utilitarian version of the participatory alternative treats, as it must, what I have called "feeling good" as the end that the process serves. Nonutilitarian versions, I would think, will in the end defend process as serving democratic values, by giv-

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172 I am convinced that an article by Erving Goffman is the source of my knowledge about "cooling out the mark," but I have been unable to locate the reference.

173 See Smolla, *supra* note 6, at 93-94. Smolla attributes the trade-off between procedures and material benefits as a political bargain struck with recipients of public assistance. *Id.* at 114-15. This is, to say the least, a curious characterization of the politics of public assistance, in which various elites purport to represent the interests of recipients. It is not obvious that a trade-off that those elites bargain for is fairly attributable to the recipients themselves. See text accompanying note 141 for a similar criticism of a related argument.

See also J. Rawls, *A Theory of Justice* 41 (1971), criticizing analogous difficulties in what he calls "intuitionist" theories. Cf. Mashaw, *Three Factors, supra* note 117, at 52 (claim to "nonalienation" does not "rank ahead of all other social values"); Mashaw, *Dignitary Theory, supra*, note 168, at 915-16 (Kantian theory allows claimant to use others, i.e., taxpayers, as means to his or her ends).
ing people a say in the decisions that affect them.\textsuperscript{174} Yet that is precisely something that due process does not do. None of the procedures give the client any authority over the ultimate decision. They give clients a say, in the sense that they are allowed to utter words in the presence of the decision-maker, but nothing requires that the decision-maker listen, or listen seriously, or believe that the client's say has added anything to what the decision-maker as a well-intentioned and sensitive person would have done anyway. Occasionally procedures will enhance democratic participation, but they seem to me indirect and often ineffectual ways of empowering the clients of the welfare state.

Perhaps empowerment could be accomplished more directly.

B. Repoliticizing the Bureaucracy

I have argued at some length that the Court's due process decisions embody a vision in which welfare state bureaucracies are professionalized and rationalized, and in which politics is not a proper basis for control within the bureaucracy. Here I want to suggest that it might make sense to invert this vision, to embrace politics and reject professionalism and its routines. Of course politics was driven out of the bureaucracy for what seemed good reasons: Established elites thought that politicized bureaucracies, dominated by the minions of immigrant political machines, were corrupt and diverted resources from valuable social goals to the pockets of brash upstarts. Professionalism was the elite's response.\textsuperscript{175} I do not want to romanticize the political bureaucracy. The elite's criticisms were frequently well-taken; urban political machines perpetuated bigotry and tolerated violent crime where it was profitable to do so. But knowing that, we may find it possible to develop a politics that avoids those evils.

There is an apparent middle course. If professional norms guide the bureaucracy, the interests of clients could be promoted by making it a professional norm that client autonomy be respected.\textsuperscript{176} For example, we could install a serious commitment to informed consent in schools and mental institutions. This middle course is however illusory because, as I have argued, professional norms do not in fact guide the bureaucracy at the street level. If deskilling has progressed as far as it seems, altering or enhancing the commitment to professional norms will not in itself have much effect. We could take as a political program making the bureaucracy truly professional, but that is not a modest middle course. It is instead, to use a term I introduced earlier, a call for a revolution by the newly proletarianized.

I would just as soon — or would also — direct my attention to the clients as well as to the deskilled bureaucrats. I want to conclude with suggestions about some of the problems I have discussed. The first is \textit{Goss v. Lopez} again. Instead of trying to work out the right procedures for kicking kids out of school, we might give the students charged with misconduct, or their parents, the power to veto any


\textsuperscript{176} See J. Handler, \textit{The Discretionary Decision}, ch. 6 (forthcoming).
proposed disposition. Then the conversation between the student and the principal would be a real one, not a disguised "cooling out the mark." We might hold in reserve an incredibly formal system of hearings, as an inducement to the student and principal to work out a mutually satisfactory disposition, and as a resource if their conversation breaks down. In the hearing, of course, both the student and the principal would have to be at risk. Now, I know that there are tough kids who ought to be kicked out of school, but they still could be. And, though the proposal is modestly utopian, we ought to consider that the conversation it promotes might be at least as educationally valuable as what goes on in schools today. Even the utopianism is manageable, for it is undoubtedly true that, should any group find it politically sensible to take my proposal as its program, the group would modify it in the process of struggling for its adoption.

My second proposal is even more utopian, again with the qualification I have just mentioned. In many areas the police see themselves and are seen as an occupying army. Things might be better in some places if responsibility for domestic tranquility were radically decentralized and deprofessionalized. Where it was possible to handle through politics the inevitable issues of class and race that would arise, we might try to establish neighborhood patrols as police forces. And again, wherever it made sense to try to struggle to that end, the issues of class and race would immediately be placed on the agenda. To succeed the group seeking neighborhood patrols would have to handle them.

Finally, we could rethink Goldberg v. Kelly. The case was designed to increase the resources available to the poor by making it harder to deny them public assistance. Even if it did so by retaining some technically ineligible people on the welfare rolls for a while longer, Goldberg could be defended on the ground that most of the technically ineligible were nonetheless grindingly poor. In an era when public assistance budgets were expanding, then, Goldberg served a useful redistributive purpose. When ceilings were imposed on those budgets, it began to achieve only redistribution from the abysmally poor to the merely poor. If we want to aid the poor, Goldberg does so, if at all, only indirectly. As I have already suggested, we might seek instead to establish a comprehensive income maintenance scheme that would redistribute wealth in a way that would permanently eradicate large disparities between the rich and the poor.

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177 See R. Burt, Taking Care of Strangers (1979). Mashaw uses the term "conversation" in describing what recipients want from the administrative process itself. Mashaw, Dignitary Theory, supra note 168 at 930-31. Mashaw regards this as a demand to dismantle the administrative state. Id. at 904. Because the vast majority of benefits are disbursed routinely and without controversy, the sense in which participatory values threaten the administrative state must be carefully specified. If it were possible simply to add participatory values in disputed cases to routine respect for entitlements in all the others, no threat would occur. But the conceptual bases of participation and of entitlement are incompatible. Entitlements rest on the view that recipients are set apart from society and must be protected against it by a set of rights, while participation rests on the view that recipients and the society form an integral whole. Thus, recognizing participatory values threatens the conceptual underpinnings of the contemporary welfare state.
Of course I offer none of these proposals as results that the Supreme Court is likely to adopt in cases soon to come before it, though I must emphasize that the arguments I have developed elsewhere establish that nothing stands in the Court’s way if it wanted to require that my proposals be adopted. Any political program has to rest on an intense examination of the particulars of the situation we face, and I have not presented the examination of schools and police forces here. Given our present situation, too, I would not want the Court to preempt essential political work by constitutionalizing my proposals. But utopian thinking is, I suggest, the best way to begin fulfilling the promise of due process.