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DIGNITARY PROCESS: A POLITICAL PSYCHOLOGY OF LIBERAL DEMOCRATIC CITIZENSHIP

*Jerry L. Mashaw**

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I. INTRODUCTION

In *Cleveland Board of Education v. Loudermill*,¹ the United States Supreme Court sought to put to rest a troublesome issue in its due process jurisprudence. Loudermill was a security guard for the Cleveland Board of Education. He was fired from his job because he lied on his job application. Although previously convicted of grand larceny, Loudermill stated on his application that he had never been convicted of a felony. The Cleveland Board of Education subsequently gave Loudermill an opportunity to explain his conduct in an appeal before the Cleveland Civil Service Commission. The Commission upheld the dismissal.

Although the Civil Service Commission's decision was appealable to the state courts, Loudermill brought a direct action in Ohio's Federal District Court claiming that the state's post-termination appeal was inadequate to protect his due process rights. The district court dismissed Loudermill's due process demand for a pre-termination hearing. The court looked to the terms of Loudermill's asserted property right, his statutory right not to be discharged without "cause," and concluded that the appropriate procedures for discharge were specified in the statute itself. These procedures were followed in Loudermill's case, the district court reasoned, and by definition, afforded him all the process that was due to protect his rights.

The district court relied explicitly on the Supreme Court's plurality opinion in *Arnett v. Kennedy*.² The plurality in *Arnett* reasoned that

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1. 105 S. Ct. 1487 (1985).

2. 416 U.S. 134 (1973).

where legislation conferring a substantive right also sets out the procedures for enforcing that right, the two cannot be separated:

The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.

[W]here the grant of a substantive right is inextricably intertwined with limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.³

Although a majority of the Court rejected this language in *Arnett* and elsewhere, the bitter-sweet theory of procedural rights has had a continuing attraction for a number of justices since the *Arnett* decision. Reacting to perceived confusion in the lower courts, the *Loudermill* majority saw the case as a vehicle for making its rejection of the bitter-sweet approach crystal clear. As the Court put it, "If a clearer holding is needed, we provide it today."⁴ The Court held that *Loudermill*'s substantive right to discharge only for cause must be separated from his procedural rights guaranteed by the Constitution. The Court believed that its prior jurisprudence required that *Loudermill* have some opportunity to contest his discharge prior to being terminated. It therefore held the Ohio procedures, which allowed only a post-discharge appeal, to be unconstitutional.

Although *Loudermill* purports to clear up a problem in the jurisprudence that has long excited commentators, I believe the opinion is wrong in its analytical approach and that the decision reaches the wrong result. The Court's approach to the determination of the requisite "interest" that excites due process concern is incoherent, offensive, and functionally inadequate. Results such as *Loudermill* both trivialize concerns that lie at the base of due process protections and unreasonably interfere with judgments about the appropriate balance of procedural and substantive rights made by local, state, and federal governments. Both methodology and results would be improved by replacing the Court's current analytic paradigm with a natural rights approach. Such a model defines due process protections in terms of those liberal democratic values that form a fundamental core of liberal democratic citizenship as evidenced by American constitutional history.

3. *Id.* at 152-54.

4. 105 S. Ct. at 1493.

Because these general arguments have been made at length in *Due Process in the Administrative State*,⁵ they will not be restated here in any detail. Instead, this article will elaborate both its methodological and outcome complaints in the *Loudermill* context. The argument is in two parts: (1) the *Loudermill* treatment seriously misdirects due process analysis; and (2) the implications of a properly conceived "natural rights" approach are no more, perhaps less, interventionist than the apparently restrained positivism of *Loudermill*.

II. THE MISDIRECTIONS OF POSITIVISM

The *Loudermill* majority restates the general principle of *Board of Regents v. Roth*:⁶ "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law'"⁷ The Court then finds the procedural dimensions of the right to discharge only for cause under the Ohio statute are defined, not by state law, but by the Court's view of the requirements of constitutional due process.⁸

It is hard not to agree with Justice Rehnquist, in dissent, when he says the Court has taken back with one hand what it gave with the other. In his words,

This practice ignores our duty under *Roth* to rely on state law as the source of property interests for purposes of applying the due process clause of the fourteenth amendment. While it does not impose a federal definition of property, the court departs from the full breadth of the holding in *Roth* by its selective choice from among the sentences the Ohio legislature chooses to use in establishing and qualifying a right.⁹

In short, the Court reads statutes as if they established rights that have some independent meaning apart from the legal protections that attend their deprivation. This would make sense only if those "rights" obtained, by their very statement, a constitutional status independent of their definition under state law. However, that is precisely what

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

6. 408 U.S. 564 (1971).

7. *Loudermill*, 105 S. Ct. at 1491 (quoting *Roth*, 408 U.S. 564 (1971)).

8. 105 S. Ct. at 1493.

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

the Court denies. This position is incoherent and ultimately unworkable.

Suppose, for example, the Ohio statute provided *Loudermill*'s "right" in the following "procedural" form: "A discharged civil service employee has a right to appeal his or her dismissal and to reinstatement upon demonstration that the discharge was effected without cause." Here the "right" itself is stated in wholly procedural terms. But its contours are the same as those existing under the statute at issue in *Loudermill*.¹⁰ What should a court do with such a statute? Should the court "interpret" it to provide, first, a "substantive right" to discharge only for cause with, second, appeal as a procedural protection for that right? If the court does not, then presumably it must find that there is no substantive right separate from the procedure and hence, no due process right to additional procedure. The employee's rights, thus, will depend on the form of the state statute. If the court does interpret the statute in this bifurcated form, however, will that interpretation be consistent with the creation of rights by state law, rather than by federal constitutional law? The answer to this question must certainly be "no."

If it can be assumed, therefore, that the Court means what it says in *Loudermill*, when reaffirming *Roth*,¹¹ the maintenance of state discretion to define positive law rights becomes a mere formality. It is a function of the way state statutes are drafted. Recognizing this, *Loudermill* will ultimately lend no more assistance to lower courts than has the Court's prior jurisprudence. Formal distinctions are notoriously unstable. As lower courts struggle with meaningless distinctions between procedure and substance, form and result, they inevitably will produce a perplexing and inconsistent jurisprudence. The Supreme Court's attempt at clarity in *Loudermill* is doomed to failure, if by clarity it sought to produce coherence.

The problems with the *Loudermill-Roth* position are deeper yet. This positivist approach to defining interests cognizable under the due process clause produces bizarre constitutional valuations of claims. A prisoner's hobby kit, for example, is "property," raising due process concern,¹² while a patient's removal from a nursing home, with its risks of physical and mental decline, does not rise to the level of constitutional notice.¹³ Having one's picture circulated to local mer-

10. See *id.* at 1491 n.4, 1492 n.6.

11. See *id.*

12. *Parratt v. Taylor*, 451 U.S. 527 (1981).

13. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980).

chants as an active shoplifter by the police department infringes no property or liberty interest,¹⁴ but failure to inform a ratepayer of the municipal utility company's procedures for pre-termination review of disputed bills invades the ratepayer's property interests.¹⁵ It is a strange constitution that protects hobby kits and rights to dispute one's water bill, while leaving entirely to legislative or executive discretion the procedures for removal of nursing home residents from their chosen facility or for the protection of one's reputation from governmental encroachment, indeed from virtual assignment to a class of "outlaws."

Finally, this focus on positive law triggers for due process concern leads to more than jurisprudential incoherence and bizarre assignments of constitutional value to citizens' interests. Such an approach is functionally inadequate to address the problems of governmental or bureaucratic discretion that the due process clause was meant to address. The positive law trigger approach gives legal protection, or at least due process attention, where some legal protection already exists, while excluding due process concern where a legal regime seems to permit official arbitrariness. Although many have a taste for irony, few would choose Kafka or Ionesco as constitutional draftsmen.

Consider, for example, the situation in *Holmes v. New York Housing Authority*.¹⁶ There, a public housing agency had no established standards for processing non-preference applications for public housing.¹⁷ The Second Circuit Court of Appeals, relying on *Hornsby v. Allen*,¹⁸ held that this violated due process.¹⁹ In *Hornsby*, a local liquor commission was ordered to grant all applications for liquor licenses until it established standards on which to base denial.²⁰ Both *Holmes* and *Hornsby* are widely cited for the proposition that unconstrained administrative discretion violates due process. Both cases seem correctly decided. Protection against Kafkaesque, unlimited discretion of officials is the underlying goal of the due process clause.

Despite their widespread citation, *Holmes* and *Hornsby* are virtually moribund authorities. A few liquor licensing decisions in the Fifth

14. *Paul v. Davis*, 424 U.S. 693 (1976).

15. *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1 (1978).

16. 398 F.2d 262 (2d Cir. 1968).

17. *Id.* at 264.

18. 326 F.2d 605 (5th Cir. 1964).

19. *Holmes*, 398 F.2d at 264-65.

20. 326 F.2d at 612.

Circuit have followed *Hornsby*,²¹ and *Holmes* has found application in a small number of cases dealing with other forms of welfare benefits.²² The reason for the limited effect of these cases is easily discernable. Where no standards exist for the exercise of administrative discretion, even broad and loose ones such as the "cause" standard in *Loudermill*,²³ positive law grants no substantive "rights." If there is no right, there is no life, liberty, or property interest that would trigger the due process clause. The Supreme Court, indeed, has made this position clear. In *Leis v. Flynt*²⁴ the Court reversed a lower court decision ordering the promulgation of standards, because the need for standards indicated a lack of entitlement.²⁵ In short, the Court's entitlement analysis, grounded in positive law prescriptions, causes due process protection to drop out of the Constitution when needed most. Discretion bounded by standards requires due process; but absolute discretion — discretion carrying the greatest danger of political oppression — escapes constitutional notice under the current analysis.

Independently considered, these three objections to the positive law trigger requirement are serious. Collectively, they make an overwhelming case for abandonment. An analysis that is incoherent, that assaults generally held intuitions about the worth or significance of particular human interests, and that renders the constitutional requirement for due process of law impotent where official power is most in need of procedural monitoring, has little to recommend it, except, perhaps, the available alternatives. Indeed, the Court may cling to positive law triggers only because they provide some anchor for due process adjudication that otherwise will be adrift in a stormy sea of "natural" or "fundamental" rights claims with no navigational aids beyond the imagination of the justices.

This judicial anxiety is hardly frivolous. Judicial enunciation of fundamental rights is not favored by commentators or the body politic. If positivist analysis is to be eschewed, the "natural rights" alternative must carry on our particular constitutional history and contain principles of self-limitation that guide and protect judicial review.

21. See *Block v. Thompson*, 422 F.2d 587 (5th Cir. 1973); *Atlanta Bowling Center v. Allen*, 389 F.2d 713 (5th Cir. 1968); *Johnson v. Brown*, 584 F. Supp. 510 (M.D. Ga. 1984).

22. See, e.g., *Carey v. Quern*, 588 F.2d 230, 232 (7th Cir. 1978).

23. See *supra* note 8 and accompanying text.

24. 439 U.S. 438 (1979).

25. *Id.* at 442-46.

III. DIGNITARY PROCESS: A CONSTRAINED, NATURAL RIGHTS APPROACH

Suppose the positive law trigger were abandoned for due process protections. What would take its place? Would any interest asserted in litigation be worthy of due process concern? And, if not any interest, then which? How will the Court decide among the concerns of citizens and litigants to affirm those concerns entitled to constitutional due process?

These questions, however, do not require answers. Rather than a constitutional theory of individual interests worthy of due process protection, what is needed most is a constitutional theory defining what it means politically to be an individual, or to act as an individual. The protection of the due process clause is the protection of individual liberty — a condition of liberal citizenship in which the significance of interests is individually determined. Courts, in applying the due process clause, must delineate a conception of liberal-democratic citizenship that can be defended against contradictory forms of law. “Life, liberty and property” merely exhaust the range of interests that might be held by citizens within the protections of such a conception of due process.

To be sure, finessing the “requisite interest” issue raises additional concerns. Do these individuals who define their own interests also get to design their own processes as a matter of constitutional right? Not at all.

The natural rights approach set forth in this article proceeds from three fundamental tenets. First, the due process clause, like the Bill of Rights (if not the Constitution as a whole) was designed to protect the political position of the individual. This is hardly controversial. Second, and more problematically, protection of the individual involves protection of the politically necessary conditions of continued individual moral agency. This is the essential prerequisite for any liberal regime. Third, our constitutional polity has a history that emphasizes the possibility of collective, democratic action as well as the necessity of individual protection. The protection of particular individual interests cannot always override collective choice. Rather, developing, pursuing, and maintaining individual interests must be preserved through, as well as in defiance of, collective action.

From these considerations, three essential elements of due process in a liberal democratic regime can be derived. First, the law must maintain zones of privacy. Individual and communal action cannot be conceived of as action in the interest of, and at the sufferance of, the state. Second, the law must be reasonably transparent and comprehensible to its subjects. Absent transparency and comprehensibil-

ity, which can be termed "thin rationality," the possibilities for rational planning and independent moral agency vanish. Third, the exercise of democratic decisionmaking must affirm, through majority rule, the equality of citizens as political agents.

Stated in this stark and abstract form, these ideas are not very meaningful. But they should be sufficient to demonstrate the radical difference between the natural rights approach advanced here and that now dominating constitutional jurisprudence. From this dignitary perspective the question in a case like *Loudermill*²⁶ is not whether the state of Ohio has defined a positive law right such that *Loudermill* has a constitutional interest. Rather, the question is whether the statutory-administrative scheme is structured so that it infringes upon a conception of *Loudermill* as a citizen of a liberal democratic regime.

Does the Ohio scheme confuse public and private spheres?²⁷ Does it treat *Loudermill* as a mere object, as a means toward collective ends without respect for his independent moral agency, or for his equality as a participant in collective democratic processes? On all counts, the answer is "no." To see why, and whether this analysis has justificatory appeal, the privacy, moral agency, and citizen equality issues must be viewed separately. The *Loudermill* facts must also be compared with situations that might arouse greater due process concern.

First, there is little or no impact here on *Loudermill*'s opportunities for continued private action.²⁸ The public employee's due process scheme, to the extent that it is relevant to issues raised in *Loudermill*, evidences no attempt to make *Loudermill*'s status as a public employee synonymous with his status as a citizen.²⁹ There are requirements and responsibilities for the retention of *Loudermill*'s job, but outside of those, *Loudermill* may act in private capacities, like any other citizen, without calling his continued employment into question.³⁰

Compare *Loudermill*'s case to the extraordinary impositions on the private sphere that attend classification of a person as mentally incompetent or criminal. In these cases the Court should be most vigilant to protect the citizen's remaining shreds of privacy and the possibilities for restoration of full private citizenship. In these cases, the citizen becomes subject to total institutions carrying out the collective will of the state, even if ostensibly for beneficent purposes.

26. See 105 S. Ct. at 1487.

27. See *supra* note 10 and accompanying text.

28. See 105 S. Ct. at 1487.

29. See *id.* at 1488-91.

30. See *id.*

A focus on privacy also teaches that other major changes in status should remain voluntary rather than state-directed. This is the liberal core of *Roe v. Wade*³¹ and *Stanley v. Illinois*.³² Similarly, courts should be wary of state power to criminalize without criminal process, or to impose legal disability without trial. This is the core of the concern characterized as “stigma” in cases like *Hannah v. Larche*,³³ *Jenkins v. McKeithen*,³⁴ *Wisconsin v. Constantineau*,³⁵ and *Paul v. Davis*.³⁶ State power to punish, ostracize, or disable is always a serious threat to individual liberty. Were the state the exclusive or principal employer in the United States, conditions on job access — even modest ones like truth-telling on application forms — might excite serious due process attention in order to maintain strict divisions between employment status and citizenship. But that is not *Loudermill*’s case.³⁷

Moreover, the “for cause” requirement in the Ohio removal statute³⁸ supports the second fundamental requirement for due process — that legal regimes be comprehensible to their subjects. The statement that the employee has a right to remain in the job unless removed for “cause” obviously is not understandable in the abstract. However, the combination of this standard with rules and regulations governing public employment, including, as in the *Loudermill* case, a requirement of honest disclosure on application forms,³⁹ hardly creates a Kafkaesque legal system. To be sure, a court should be concerned that a broad and loose “for cause” standard has some stable meaning within the entire administrative system. Inconsistency or incoherence that prevented individual self-application of the rules, or a cogent defense to charges of impropriety, would suggest a denial of due process. But the system at issue in *Loudermill* is hardly the system at issue in *Holmes* or *Hornsby*.⁴⁰ Neither the criteria for judgment nor the processes of application are mysterious here. The system confirms *Loudermill*’s status as an independent moral agent, entitled to reasons from his employer and capable of understanding and acting on relevant information.

31. 410 U.S. 113 (1973).

32. 405 U.S. 645 (1972).

33. 363 U.S. 420 (1960).

34. 395 U.S. 411 (1969).

35. 400 U.S. 433 (1971).

36. 424 U.S. 693 (1976).

37. 105 S. Ct. at 1488.

38. See *supra* note 10 and accompanying text.

39. See 105 S. Ct. at 1491 n.4.

40. See *supra* notes 30 & 32 and accompanying text.

This demand for comprehensibility is not a demand for "strong democracy." *Loudermill* himself need not understand the rules fully or have participated in their formulation. Comprehensibility does not deny the possibility for bureaucratic regimes of considerable complexity. The technicalities and interrelations of the Internal Revenue Code may be difficult to understand,⁴¹ and the Internal Revenue Service has some advantage in disputes about its meaning. But, looked at comprehensively, the Internal Revenue Service collection system⁴² provides many places to stand and defend based upon the law. Champions can fight back, even if the Code causes occasional befuddlement.

Finally, there is no significant impairment of *Loudermill*'s participation in democratic collective action at issue in *Loudermill*.⁴³ To be sure, further procedural protections would give him greater leverage in resisting whatever political blandishments might come from his superiors. But the "for cause" limitation⁴⁴ itself establishes a civil service regime that is sufficient to defeat any attempt to mold individual political participation by withholding public employment. Indeed, the Supreme Court's own jurisprudence eliminating the spoils system as a part of due process virtually makes the "for cause" standard necessary. It was in a prior decision, *Elrod v. Burns*,⁴⁵ that the Court protected the requirements of citizen equality that are at the base of the demand for due process of law. There is no evidence that the Court need go further in *Loudermill* to assure that democratic equality is maintained.

Pursuit of the basic "natural rights" criteria of due process with reference to the *Loudermill* facts gives texture to the second objection to the Supreme Court's current due process approach. That approach is not only under-protective of interests not well defined in positive law, it seems over-protective of rights that are so defined. The fundamental conditions that define a political psychology of liberal democratic citizenship — privacy, legal intelligibility, and political equality — are not impaired by the Ohio system for removing public employees.⁴⁶ Thus, the Supreme Court should not impose upon the City of Cleveland further procedures for the treatment of cases like *Loudermill*'s. While the Court is usually criticized because of its entitlements analysis from

41. I.R.C. §§ 1-9602 (1986).

42. I.R.C. §§ 6301-6365 (1986).

43. 105 S. Ct. at 1487.

44. See *supra* note 8 and accompanying text.

45. 427 U.S. 347 (1975).

46. See *supra* note 10 and accompanying text.

those who perceive a need for more expansive protections under the due process clause, the concerns presented here are at least equally troublesome as inappropriate judicial activism. It is doubtful that an "entitlement" will be found to be associated with a real threat to liberal democratic citizenship on more than a chance basis. Properly conceived, a natural rights theory of constitutional due process, therefore, should promote judicial restraint at least as often as it provides necessary protections for individual interests.

