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Robert C. L. Moffat

LEGALITY OR LEGALISM? SOME CRITICAL REFLECTIONS ON THE QUEST FOR DUE PROCESS

*Robert C. L. Moffat**

On the thirteenth and fourteenth of February 1987, a distinguished group of scholars gathered at the University of Florida College of Law to share their ideas on the topic of due process. The occasion was the law faculty's observance of the bicentennial of the United States Constitution. The topic of due process was particularly suitable for that observance because a good case can be made that it is the most fundamental constitutional guarantee in our system. Various freedoms protected in the Bill of Rights, such as speech, press, and religion, receive much more attention from the media and in the popular mind. Equal protection often receives much more attention in the courts and in the legal literature. But all of these other guarantees are meaningless without the foundation provided by a firm guarantee that the legal procedures will adhere to principles of due process. The protection of our liberty in the guarantee of free speech remains only a paper protection unless the courts are under an obligation to reach rational, non-arbitrary decisions. Hence, it is especially appropriate that these scholars devoted their attention to the fundamentally important topic of the meaning of due process.

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*Professor of Law, University of Florida College of Law. B.S. Southern Methodist University, 1958; M.A., LL.B. 1962; LL.M. University of Sydney, 1966.

The meaning of due process seems beguilingly simple but turns out to be highly complex. Even the eighteen papers included in this symposium do not collectively do justice to all aspects of due process. Perhaps three times the space would be required to deal adequately with all of the nuances of this deep and complex topic. However, in these papers certain fundamental themes emerge that are characteristic of the topic as a whole. The most obvious fundamental theme is the issue of the nature of due process itself. More specifically, the issue is how the nature of due process is reflected in our vision of the nature of law. On the one hand, we have scholars who see due process as a kind of heavenly venture in which due process represents the quest for legality. This is the optimistic view. On the other hand, we have scholars of a more skeptical bent who see due process as nothing but — or at least the tendency toward — the degeneration of law into an over-technical legalism. This latter view is most famously represented in the morbid prediction of Grant Gilmore that "[i]n hell there will be nothing but law, and due process will be meticulously observed."[1] Our authors write in the context of this conflict between two views of due process. Is due process a benefit — something desirable in a legal system — the transcendence of law over itself? Or is due process merely the triumph of the lawyer's technical preoccupation with the defeat of just ends?

In the context of that conflict between good and evil visions of due process of law, the authors in this symposium pursue certain themes regarding the nature of due process. Some papers emphasize the notion of fairness as the essence of due process. Others emphasize the integrity of the legal system itself as the true fundamental meaning of due process. Yet other papers emphasize the fundamental reciprocity between the government and its citizens that represents the spirit of due process. All of these themes and more are presented here. All find themselves struggling between the tensions of that fundamental conflict between visions of due process as good and as evil. Let me now turn my attention to some of the specific themes brought out in the papers for the conference.

I. Due Process as Fundamental Reciprocity

Lea Brilmayer points out the narrow focus of most contemporary procedural due process analysis.[2] Instead, Professor Brilmayer invites

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1. Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 Yale L.J. 1022, 1044 (1975).

2. Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. Fla. L. Rev. 293, 293-94 (1987).

us to consider the deeper and more challenging problems of jurisdictional due process. She surveys the various rationales offered to justify jurisdiction, which include territorialism, membership in a community, benefits provided by the state, and implied consent of the governed. All of these various rationales, however, turn out to rest upon reciprocity between the citizen and the government. Hence, the courts repeatedly speak of "reciprocal obligations."[3] From her survey, Professor Brilmayer concludes that, although the rationales worked out in the judicial decisions are inadequate, they nonetheless do in their fundamental points mirror the more sophisticated justifications for governmental power that are to be found in political theory.

One important point Professor Brilmayer brings out in her analysis is an emphasis on the fact that due process, at least in its jurisdictional form, cannot be satisfied merely by fairness. In many situations the process to be imposed is quite fair, but the objection under jurisdictional due process is that the government that seeks to impose that process lacks the legal competence to do so. Hence, other justifications must be sought for that exercise of governmental power. Such questions, Professor Brilmayer correctly observes, raise the most fundamental questions of political philosophy. Professor Brilmayer's answer to those issues takes refuge finally in the concept of reciprocity between government and citizen. That basis is consistent with democratic principles and the ideals of impartiality in the legal system that are exemplified by the notion of due process.

This point is underscored in Carl Wellman's comment on Professor Brilmayer's paper.[4] He observes that the answer to this question may be found in Lord Coke's interpretation of Magna Carta, because Coke saw the rationality of the common law as resting on its judicial procedures.[5] Wellman may seem to be reinterpreting Brilmayer's focus on reciprocity in terms of reason. However, that is not the case, because the basis for that common law rationality is itself a form of tacit

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3. *Id.* at 303. Professor Brilmayer states: "[T]he state may demand reciprocal duty from an absent citizen." *Id.*

4. Wellman, *Commentary on Brilmayer: Jurisdiction, Fairness and Rights*, 39 U. FLA. L. REV. 315 (1987).

5. *Id.* at 320. Professor Wellman states:

> Coke believed the traditional rights of Englishmen recognized in the common law were protected by the judicial procedures required by that same common law. This is no accident, but a necessary consequence of the rationality of the common law. The same reason that makes evident the rights of the individual dictates the reasonable procedures established in the courts of common law.

Id.

consent,[6] and tacit consent arises from the reciprocity between citizen and government that is reflected in the due process clause.

II. Due Process as Dignitary Process

Jerry Mashaw also pursues the theme of legality and legalism in his contribution to the symposium. He begins with a detailed study of *Cleveland Board of Education v. Loudermill*.[7] He criticizes the Court's handling of the *Loudermill* case in terms that amount to a condemnation of legalism. In this case, the legalism is a reading of a technical right to appeal into the process provided by the state law challenged in that case. Loudermill contested the fact that the state process provided a post-termination hearing. The Court agreed with his complaint and imposed upon the state a pre-termination right to a hearing. Professor Mashaw sees this result as one that trivializes due process.[8] He proposes an improvement by moving to a natural rights approach in which "liberal democratic values" would form the core of the due process analysis.

Professor Mashaw's attack on the Court's legalism in its due process analysis shows up again in his condemnation of formal distinctions as "notoriously unstable."[9] Instead, he believes that "[p]rotection against Kafkaesque, unlimited discretion of officials, is the underlying goal of the due process clause."[10] The best-known popular example of legalism is Joseph Heller's novel *Catch-22*.[11] Professor Mashaw provides an example of a legal Catch-22 that results from the Court's current formalistic jurisprudence. The Court holds, on one hand, that failure to follow standards indicates a deprivation of due process. On the other hand, the failure to provide standards indicates a lack of entitlement and therefore that there is no right protected by due process. The consequence is, Professor Mashaw observes, that "[d]iscretion

6. *Id.* at 320-21. Professor Wellman continues: "[A]ny deprivation of life, liberty, or property by due process of law is no violation of individual rights because in consenting to lawful authority the individuals have, to this limited extent, waived their rights." *Id.*

7. 470 U.S. 532 (1985).

8. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. Fla. L. Rev. 433, 434 (1987). Professor Mashaw sees *Loudermill* as at odds with "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." *Id.*

9. *Id.* at 436.

10. *Id.* at 437.

11. J. Heller, Catch-22 (1961).

bounded by standards requires due process; but absolute discretion . . . escapes constitutional notice under the current analysis."[12]

Professor Mashaw proposes to replace this legalism with an analysis of due process based on fundamental tenets of what he calls natural rights. These natural rights are based on assumptions about the necessary dignity of the individual in a liberal democratic state. From these postulates, Mashaw concludes that there are three essential elements of due process in a liberal democratic regime. These elements include the necessity of zones of privacy, the operation of democratic decisionmaking, and perhaps most interestingly that "the law must be reasonably transparent and comprehensible to its subjects."[13] Professor Mashaw's dignitary perspective would produce greater rights to due process in some cases and more modest due process rights in other cases such as that of *Loudermill* upon which Mashaw focuses.[14] With such carefully balanced conclusions, Professor Mashaw presents a persuasive case that insight into the nature of due process is yielded by focusing on the dignity of the individuals who participate in the governmental process.

In his comment on Professor Mashaw's paper, Martin Golding seeks to take Mashaw's analysis further. For example, he asks whether the process employed in a decisionmaking situation and the techniques of decision are separable. His conclusion: they are not.[15] What Professor Golding describes here is the kind of point that Lon Fuller observed long ago as a morality of adjudication and of other forms of legal decisionmaking.[16] Each process has its own particular forms and processes that are peculiar to it. Professor Golding takes this analysis further in enlarging upon Professor Mashaw's focus on human dignity

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12. MASHAW, *supra* note 8, at 438. Professor Mashaw, however, may overlook the difference between reviewing the application of legal standards and attempting to review the exercise of managerial direction, unguided by rules.

13. *Id.* at 439.

14. It seems unclear, however, that Professor Mashaw's dignitary process must be limited in its justification of political theory to a liberal democratic state. It would appear possible to justify dignitary process also on the basis of at least some conservative or even radical communitarian political theories. In those cases the justification would be not because the individual as such was entitled to the dignity imparted by the dignitary process, but rather that the dignity of that process was one that characterized the society that members of that polity strove to achieve.

15. Professor Golding states: "Although there is a requirement of fairness and neutrality that pervades the model situations, the criteria of neutrality and fairness are context-relative." Golding, *Commentary on Mashaw: Process and Psychology*, 39 U. FLA. L. REV. 445, 449 (1987).

16. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3.

as the basis of the process. In so doing, he shows that dignity is going to be realized in different ways within the context of the varying procedures. Dignity will be realized in a more formal way in an adjudicative setting, in a less formal way in a setting of conciliation or mediation. Professor Golding's point is that the procedure of adjudication requires a certain distancing between the parties. Hence, it is appropriate to strangers rather than to family members. As we all know, it operates in opposition to the natural strains of friendship and bonds within the family. Professor Golding believes that that is because rights discourse has its natural home in the strangerhood relationship.[17] Such friendly strangers, of course, are appropriate role models for citizens, though inappropriate for family members. In bringing out this point, Professor Golding makes clearer the limitations as well as the advantages of the dignity that due process is supposed to impart in Professor Mashaw's view.

III. Due Process as Integrity

Fletcher N. Baldwin, Jr. undertakes to relate the general issue of due process to the vicissitudes of the adjudication of the exclusionary rule under the fourth amendment by the Supreme Court of the United States. He does so by relating due process to Lon Fuller's concept of the Internal Morality of Law.[18] Baldwin sees the internal morality as "a precondition to the existence of a civilized legal system."[19] This civilized legal system he equates with the requirement of due process under our Constitution.[20] This fundamental requirement of internal morality of law, which is equated with due process, Baldwin sees as reflected in the demand for governmental integrity. The Court's obligation under the Constitution, he argues, is to maintain the integrity of governmental, and particularly, of judicial processes. He then undertakes to examine whether the Court has upheld this obligation in its adjudication under the fourth amendment.

His examination produces a trenchant criticism of the Court for destroying the integrity of the adjudicative process in fourth amendment cases. He accuses the Court of employing instead a legalistic

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17. Golding, *supra* note 15, at 450.

18. L. Fuller, The Morality of Law 33-94 (rev. ed. 1969).

19. Baldwin, *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. Fla. L. Rev. 505, 506 (1987).

20. *Id.* at 506. Professor Baldwin states: "Without due process, application of the rules we live by would be less than meaningful." *Id.*

approach to the fourth amendment that vitiates its integrity.[21] Professor Baldwin does not ignore the concept of due process as fairness. Instead, he sees integrity as the critical ingredient in insuring fairness.[22] After a review of the considerations both in favor of and against restriction of the exclusionary rule, Professor Baldwin concludes that fourth amendment protections are essential to a free society.[23] Nonetheless, he does, at least implicitly, recognize that the issue is a difficult one. He states that "although the conclusions of the present Court in the exclusionary rule area are less than constitutionally moral in their focus, at the least they reflect the current popular attitude toward crime."[24] Nonetheless, he concludes that a proper focus on the integrity of the guilt determination process should at least lead the Court to achieve its cutting down of the exclusionary rule "with a more principled scalpel."[25]

Professor Baldwin's indictment of the Court's exclusionary rule jurisprudence is forceful. In the process of that indictment, he makes the point that quite major intrusions into privacy are tolerated by the Court's current exclusionary rule jurisprudence. A revealing contrast is provided by Professor Mashaw's criticism of the elaborate due process provided to the discharged school bus driver in the *Loudermill* case. Ironically, Loudermill could have been convicted on the basis of evidence seized in an illegal police burglary of his home. That evidence might be admitted under the Court's loosening exclusionary rule standards. On the other hand, when Loudermill lied about the felony conviction on his school bus driver application and was later discharged when the lie was discovered, he is entitled, according to the current Court, to the due process of a hearing before his termination even though that step is not provided by state law. This hypothetical may be a good example of the miscalculation of priorities of which both Professors Baldwin and Mashaw complain.

Ronald Akers' commentary on Professor Baldwin's paper makes two interesting points. One is that the rule appears to be better

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21. *Id.* at 511. Professor Baldwin calls the Court's procedure a "cynical emasculation of a rule designed to insure integrity of process." *Id.*

22. *Id.* at 515.

23. *Id.* at 539. He states that "security against unrestrained police intrusion is elemental to this free society and lies at the heart of the fourth amendment . . . ," *id.*, and that "the Court . . . [is] disguising [its] agenda in a shroud of obfuscation and casuistic rhetoric." *Id.*

24. Baldwin, *supra* note 19, at 542.

25. *Id.* at 543.

observed by law enforcement personnel than the Court's decisions sometimes seem to assume. Moreover, law enforcement agencies, according to Professor Akers' research, take pride in their adherence to the rules. On the basis of this evidence, there would appear to be a much less persuasive case than is often assumed in favor of cutting back the exclusionary rule on the suppositions that it hampers the police and that it fails to deter them from illegal conduct. Professor Akers' evidence suggests that both of those propositions would not be well-supported. On the basis of that evidence, Professor Akers proceeds to concur with Professor Baldwin's conclusion that "integrity of the law, rather than deterrence, [is] the central purpose of the rule."[26]

Francis Allen takes a different tack in his comment on Professor Baldwin's paper. He steps back and takes a longer view, raising the question of what benefit such detailed attention to the due process analysis of the Warren Court has for contemporary criminal law scholarship. Nonetheless, he agrees with Professor Baldwin's assessment of the Court's current jurisprudence, going so far as to say that "[i]t is a product of the dominant intellectual mode employed by the Supreme Court and delineated by Professor Baldwin. This approach eschews principle and concern for the integrity of the criminal justice process and, instead, employs a shallow and mean-spirited pragmatism, intent on securing small law enforcement advantages in individual cases."[27] Moreover, Professor Allen enlarges on that condemnation on the basis of a more extensive, albeit cursory, survey of contemporary judicial attention to the criminal justice system. His criticism is broader and ultimately, therefore, even more telling than Professor Baldwin's.[28] Still, in the face of such a comprehensive statement of the challenges we face, he concludes with an exhortation to aspire to the objective of due process, citing the great scholar Max Radin that "[w]hat we seek . . . is a juster justice and a more lawful law."[29]

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26. Akers, *Commentary on Baldwin*, 39 U. FLA. L. REV. 551, 554 (1987). He continues: "The operation and effect of the rule fit this concept and the empirical evidence better than deterrence. The integrity rationale is supported by public perception and is a model of professional, constitutionally-sound law enforcement for the police." *Id.*

27. Allen, *Commentary on Baldwin*, 39 U. FLA. L. REV. 545, 546 (1987).

28. *See id.* at 548. Professor Allen concludes: "Generally, the system regularly fails in its preventive and incapacitative functions; is most imperfectly constrained by the principles of legality; and often denies human values of which the due process concept represents one expression." *Id.*

29. *Id.* at 550 (citing Radin, *A Juster Justice, a More Lawful Law*, in ESSAYS IN HONOR OF O.K. MCMURRAY 537-64 (1927)).

IV. DUE PROCESS AS PUBLIC PARTICIPATION

Judith Resnik directs her remarks to the role of the public in adjudicative processes. Her examination reveals that, while there has been general agreement that the public should have a right to be present at judicial proceedings, there has been no emergence of a clear set of reasons why that should be so. In her examination of the case of *Richmond Newspapers, Inc. v. Virginia*,[30] she finds at least five different rationales buried in the various concurring opinions. These five rationales are history, catharsis, education, control, and accuracy.[31] Professor Resnik finds each of these proffered rationales somewhat inadequate[32] and adds a sixth of her own. Her additional rationale is an interactive, norm-generative function.[33] The result of this interaction of the public with the legal process is that "by having public participation, we gain the possibility of generating shared narratives of powerful significance."[34] However, Professor Resnik finds that even her own additional rationale for public participation of interaction to assist in the expression and generation of norms is itself not fully adequate as a justification for the public role in the legal process.

Professor Resnik's caution seems to be be generated by the conviction that it is perilous to try to fit many different, individual cases under a broad general rule. Clearly there are many different kinds of judicial proceedings involving varying considerations of the public interest in participation. Professor Resnik's argument appears addressed, not so much to an absolute rule of public participation in the process, as to a general presumption in favor of public participation in the legal process. Professor Resnik is struck not only by the variety of conventional judicial proceedings, but even more by the greater array of proceedings that is now emerging in which the claim is possible that the proceedings are not public.

This emergence of forms of alternative dispute resolution with some connection to judicial proceedings obviously concerns Professor Resnik deeply.[35] Her nightmare is apparent. It is not that some judicial

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30. 448 U.S. 555 (1980) (plurality opinion).

31. Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 416 (1987).

32. *Id.* at 417 ("With a Courtroom closed, the interaction between public and process is limited.").

33. *Id.* Professor Resnik states: "[T]he norms are generated in the course of the interaction among disputants and adjudicator, and among disputants, adjudicator, and the public." *Id.*

34. *Id.* at 419.

35. *Id.* at 431. She asks "consideration of the public aspect of due process as the new institutions of dispute resolution are being installed in our courts and as courts defer to other modes of decisionmaking." *Id.*

proceedings will be closed to the public under rare and exceptional circumstances. Rather, the vision she fears is one in which the many forms of nonjudicial dispute resolution now coming into favor will be considered on some blanket basis as out of the public realm and therefore not open to public observation. Such a wholesale exclusion of public participation from segments of the legal process would certainly impinge quite markedly on the various interests secured by the rationales articulated in the existing judicial decisions. That exclusion would certainly be contrary to the public interest articulated in Professor Resnik's additional rationale of interaction by the public in the process to assist in the expression and generation of norms. A major exclusion of the public from significant segments of the legal process would be inimical to the interest expressed in the interaction rationale. Professor Resnik's fear is one of a legalistic result, but her hope is based on a vision of legality. In her vision public interaction in the judicial process is a central feature of the growth and development of law. That vision of law is built upon the fundamental quality of due process: the aspiration to legality.

V. DUE PROCESS AS A ROLE FOR LIBERTY

Timothy Terrell completes his "entitlement" quartet with his contribution to this symposium.[36] Thus, he writes in a rich context of his own prior analysis of the more focused problems of procedural due process that have dominated the Court's attention in recent years. Like our other writers, he joins in criticism of the Court's analysis, specifically on the common ground that the judicial response has been lacking in the qualities of legality and has degenerated into legalism.[37] The specific focus of Professor Terrell's work on procedural due process has been the problem of the procedures that are due in what are known as entitlement cases. As he points out, this line of thinking dates back to Charles Reich's classic article *The New Property*[38] that conveyed "his somber and depressing view of contemporary life."[39]

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36. For citations to Professor Terrell's three previous articles on this topic, see Terrell, *Liberty and Responsibility in the Land of "New Property": Exploring the Limits of Procedural Due Process*, 39 U. FLA. L. REV. 351, 353 n.2 (1987).

37. *See id.* at 352. Professor Terrell states: "Much of that derogatory analysis is based on the Court's failure to identify any consistent, meaningful, or comprehensive theory of the due process clause as the starting point or the organizing principle for its analysis." *Id.*

38. *Id.* at 353 (citing Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

39. *Id.* at 354.

Terrell calls Reich's answer to this melancholy view "big law."[40] The development of constitutional law since Reich's seminal article has clarified that the crucial question is how much process one is due in cases involving entitlements.[41] How is that to be decided? Under the current Court's jurisprudence, a close analysis of the concepts of property and liberty is required.[42]

In the course of his analysis, Professor Terrell discusses the dignitary process analysis of his fellow contributor Professor Mashaw.[43] Professor Terrell objects, however, that "individual dignity never seems to include individual responsibility for one's unforced choices."[44] Professor Terrell says that he agrees with Professor Mashaw that "procedural fairness or nonarbitrariness is an independent normative value itself."[45] However, because of his difficulties with the abstract quality of human dignity, he would prefer to root the concept in "the notion of balance between the individual and government."[46] The significance of this amendment to the meaning of human dignity is Professor Terrell's argument that "the competitive forces of the marketplace can also establish a protective buffer between the individual and government in certain circumstances."[47] Professor Terrell calls for a distinction between exchange transactions and government largesse, because the latter is assumed to involve needy persons incapable of exercising free choice.[48] According to Professor Terrell, "the government, as a regulated 'monopolist,' is prevented from extracting certain monopoly rents."[49] In exchange transactions on the other hand, the forces of the marketplace are available as a potential competitive balance. Thus,

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40. *Id.*

41. Professor Terrell observes that the most persistently troubling issue has been "whether and to what extent procedural protections attaching to government entitlements are as constitutionally sacrosanct as substantive rights." *Id.* at 357. Terrell restates the issue as "whether an individual may waive certain procedural protections, such as a pretermination hearing, when accepting government largess." *Id.* at 358.

42. *See id.* at 359 (Court will not treat the phrase "life, liberty, or property" as "a unitary concept").

43. *Id.* at 365. Professor Terrell notes Professor Mashaw's argument that "due process is a substantive end in itself [because it] is a basic principle of individual dignity." *Id.*

44. *Id.* Professor Terrell adds that "[s]urely a complete account of [human dignity] will demand an accounting of this element of autonomy as well." *Id.*

45. *Id.* at 370-71.

46. *Id.* at 371.

47. *Id.* at 372.

48. *See id.*

49. *Id.*

he sees liberty as having a meaningful role to play in market transactions.[50]

Professor Terrell recognizes, however, that unmitigated reliance on market forces would turn out to be illusory. Some limitation is essential on what can be contracted away, if there is to be any reasonable protection of recognized property interests. Professor Terrell finds such a limiting principle in the economic notion of "error cost analysis."[51] In some bargaining situations, the value of rights to the participants may not be commensurable.[52] Professor Terrell draws the corollary of this proposition: when "incommensurable values are *not* at stake, then rights themselves certainly can be the legitimate subject matter of contractual negotiation and compromise."[53] Professor Terrell concludes that a proper due process analysis in entitlement cases would turn on whether the rights are deemed to be commensurable.[54] Professor Terrell concedes that this position represents a "more constrained attitude"[55] on his part regarding contractual waiver.[56] Thus, in spite of the rather grand sounding statements regarding individual liberty and the necessity of individual responsibility if liberty is to be taken seriously,[57] Professor Terrell concludes much more modestly and indeed only in criticism of the universally criticized result of the Court in the *Loudermill* case.

In light of the careful qualifications Professor Terrell places on his application of liberty, one is left to ask precisely how much responsibility would be left to the individual to exercise independent of the Court's protecting hand. Ironically, Professor Terrell's careful efforts to preserve a role for liberty and its attendant responsibility, qualified

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50. "Liberty mandates that individuals, as part of their dignity, take some responsibility for their unforced choices." *Id.* at 373.

51. *Id.* at 379. Professor Terrell defines error cost analysis as the situation in which "the parties to a transaction would be unable to measure the impact of the transaction on either themselves, third parties, or both." *Id.* at 380.

52. *Id.*

53. *Id.*

54. *Id.* at 382 ("The real issue is whether the procedural rights involved in these cases somehow endangered incommensurable values and therefore should be removed from the market.").

55. *Id.* at 384.

56. Professor Terrell's present view is that in nonmonopoly situations "the rational relationship requirement can also serve as a standard for assessing whether an individual in fact exercised freedom of choice in waiving a right." *Id.* at 384.

57. For example, Professor Terrell concludes "[i]f that element [of liberty] is to have any meaning in the land of new property, then individuals must be assumed to accept some measure of personal accountability for their own voluntary choices." *Id.* at 385.

as extensively as they are, may lend a degree of authenticity to the somber vision of Charles Reich that gave rise to the concept of "big law" in the first place. In this same regard, the role the Court has carved out for itself to supervise the adequacy of procedural protections provided in various voluntary state programs must be noted. Even with Professor Terrell's suggested revision, the Court's due process jurisprudence will still be legalistic analysis. If so, then how can the aspiration to legality represented by the due process clause flourish in such a formalistic environment?

Patricia Smith's comment on Professor Terrell's article raises two basic questions. First, she criticizes his "positivistic approach to legal analysis in general." Second, she attacks his "market model of due process adjudication."[58] Despite an overly broad definition of positivism that might otherwise cause problems,[59] Professor Smith's focus on positivism is right on point with regard to the entitlement cases. As noted previously, those entitlement cases are widely criticized as representing precisely such a positivistic analysis of language and are therefore subject to the critique Professor Smith offers of the abuse of positivistic analysis. It is less clear that Professor Terrell shares

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58. Smith, *Commentary on Terrell: Definition and Metaphor in Legal Analysis*, 39 U. FLA. L. REV. 387, 387 (1987).

59. Professor Smith's definition is so broad that it could encompass not only the linguistic analysis she mentions but could include *any* kind of analysis of concepts. *Id.* at 389. She appears to see the positivist enterprise as including all efforts to make theory "coherent, accessible, supportable, and predictable." *Id.* at 388. Her definition, however, would include the entire common law tradition epitomized in the work of Coke, Mansfield, and Blackstone. More recently, the work of such legal theorists as Karl Llewellyn and Lon Fuller has criticized the positivist position on the grounds that its purported predictability is illusory, precisely because it fails to take into account the sociological and historical factors necessary for accurate prediction. Professor Smith adopts the common criticism of positivist analysis that it leads to rigidity and formalism. The cause of this rigidity, however, is that the courts do not do a good enough job of "serious conceptual analysis." Instead, "[t]hey are applying their own linguistic intuitions and assuming that those intuitions are representative of common use." *Id.* at 390. This abuse is compounded in her view when courts represent this shallow linguistic product as "conceptual analysis of objective data leading to determinate conclusions derived from the objective meaning of the terms: the language of the law." *Id.* Many legal scholars would object to this view, but not on the grounds that the courts are necessarily doing a better job than Professor Smith suggests. The objection would be that, at least most of the time, whatever language the courts are analyzing is not with a view to arriving at the "intuitions" that are "representative of common use." *Id.* The typical judicial exercise is in framing arguments regarding the meaning of language that has developed special meanings in the context of prior judicial decisions. Hence, any parallel between the meaning of language for the courts and its common linguistic usage will often be rather incidental. In any event, judicial efforts, even when focused on linguistic analysis, are not often limited to that alone.

that sin. Professor Terrell has chosen to work within the linguistic paradigm established by the entitlement cases. Only by working within that paradigm can he hope to present persuasive arguments that the paradigm is not entirely consistent.[60] One might choose to argue, as Mashaw does, that any analysis based on such linguistic positivism is doomed to a formalism that results in absurdity. But the fact that Professor Terrell seeks to persuade the Court on its own positivistic terms does not necessarily mean that Professor Terrell himself shares the vice of positivism.[61] Of course, Professor Terrell's efforts depend upon continuation of the current "entitlements" paradigm. All of his work *could* be eclipsed at any time, if the Court were to decide that the present paradigm is mistaken and return to adjudication based on a unitary treatment of "life, liberty, and property" rather than the particularized analysis presently employed in such cases.

Professor Smith also criticizes Professor Terrell's argument that the market is relevant in determining how much due process is needed to constrain governmental powers.[62] Although the market imposes restraint under some circumstances,[63] it provides no significant protection to replace the constraints imposed by due process.[64] That, however, is not the argument Professor Terrell meant to offer, and Pro-

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60. *See* Moffat, *Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction*, 37 U. FLA. L. REV. 297, 337-340 (1985).

61. In Professor Smith's view the vice of positivistic analysis is not doing the linguistic analysis well enough. *See* Smith, *supra* note 58, at 390. I see the vice of positivism as taking the linguistic analysis as though it were analysis of reality. *See* Moffat, *The Perils of Positivism*, 10 HARV. J.L. & PUB. POL'Y 295, 297-305 (1987). The Court may or may not really believe that its analysis is of what property and liberty actually are, but the vice of positivistic formalism is to assume that the Court in its analysis is "really" talking about property and liberty.

62. Professor Smith notes that the purpose of due process in cases of governmental arbitrariness involving government entitlements would be twofold. First, "one major purpose of due process in such cases would be to retard prospectively the likelihood of arbitrariness through the threat of the existence of judicial review." Smith, *supra* note 58, at 392. But a second purpose would be that "if arbitrariness does occur, the purpose of due process would be to provide an avenue of correction." *Id.* at 392-93. The significance of Professor Smith's observation is that, to the extent that the market is effective, neither of these due process protections would be required. On the other hand, due process protection would serve as a backup to any check on arbitrariness provided by the market. Hence, she concludes that due process protections would not interfere with any protections provided by the market. *Id.* at 394.

63. *See id.* The market would provide protection only where an individual has special skills or where there is a shortage of qualified employees. Under such conditions of scarcity, employers will provide more protections in order to attract workers than they would otherwise do. Thus, the protections the market would provide are quite limited. *Id.*

64. *Id.* Professor Smith concludes: "The point is that the function and aim of a market is fundamentally different from the function and aim of due process." *Id.*

fessor Smith concedes that fact.[65] Instead, his argument is that governmental arbitrariness should be acceptable within permissible limits, and he poses for himself the task of delineating what those permissible limits might be.[66] The problem is that Professor Smith disagrees with Professor Terrell's fundamental assumption that there should be *some* limitations on possible challenge to arbitrary governmental action.[67] Moreover, she argues that focusing on the individual's liberty is misleading. Her preference is that the courts, rather than administrative agencies or legislatures, should make decisions as to procedures.[68] In this preference she seems inattentive to Grant Gilmore's fear that due process would expand into such a monstrous empire of legalism that it would swallow us up. On a smaller scale he would presumably also fear that government agencies would become so hamstrung by potential litigation that incompetent or dishonest employees would never be discharged.[69]

Nonetheless, Professor Smith seems correct in describing the liberty Professor Terrell advocates as amounting only to a choice as to whether to accept the government job. Talk of waiver is empty.[70]

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65. *Id.* at 395 ("Professor Terrell is not arguing for the prevention of governmental arbitrariness.").

66. Professor Smith summarizes Professor Terrell's view as asking "why should government have to be fair when it is acting in its capacity as an employer in a nonmonopoly situation? Why should government have to offer employees a better deal than private employers would?" *Id.* at 396. Professor Smith finds totally unpersuasive the notion that governments should be allowed to operate in the market the same as private entities. So far as she is concerned, "the Constitution is intended to limit *government* power, to constrain *governmental* abuse, to protect individuals from improper *governmental* action." *Id.* The question raised by her argument is whether there should be any limits on the ability of citizens to challenge governmental action which they dislike in cases in which they are somehow involved.

67. Moreover, we must bear in mind that much of the argument is centered, not on *whether* the citizen should be able to challenge arbitrary governmental action, but on *when* the citizen will be permitted such a challenge. For example, the only question in the *Loudermill* case was whether Loudermill should be able to challenge his termination prior to discharge rather than after he had been fired. *See Loudermill*, 470 U.S. at 532.

68. Professor Smith wants us to attend to the fact that it is possible to "describe the situation by focusing on the actions of the government employer." Smith, *supra* note 58, at 398. If we did so, our concern would be "should the governmental agency have the total power to grant or deny a right to a pretermination hearing in an employment situation"? *Id.*

69. Precisely that complaint has been made to me by professionals employed by the federal government regarding the support services available to them.

70. Professor Smith states, "The choice is not whether to waive or not waive a due process right. The choice is whether or not to take the job." *Id.* She finds it misleading to speak of waiving rights. She asks, "was there *any* way that any of them could have avoided selling or waiving the right?" *Id.* at 399. She answers her own question: "If there is no viable way to

Moreover, Professor Terrell's new addition of error cost analysis provides no rescue to his argument regarding waiver. The notion of incommensurability is unhelpful, because the vagueness of rights, rather than their importance, becomes the criterion for judicial protection.[71] A further difficulty with any actual judicial attempt to determine the incommensurability of rights would be the virtual impossibility of such a calculation.[72] In summary, Professor Smith's critique raises fundamental questions as to the tenability of Professor Terrell's market model, of his theory of waiver, and of his proposed use of error cost analysis as a check on the limits of waiver. The market model does not seem helpful in thinking about the problem of entitlements. However, Professor Smith points out that "a theory of reasonable choice" might provide a satisfactory solution to Professor Terrell's problem.[73] Her suggestion might be acceptable to Professor Terrell, because a notion of reasonable choice is consistent with the objectives of error cost analysis.

Nonetheless, even a theory of reasonable choice would not respond to the problem posed by Professor Smith's fundamental assumption that government should always be called to account for arbitrary actions, even when those actions occur in the context of a market in which the government's action is indistinguishable from the action of others. The difficulty is that she does not offer arguments to support that assumption. We do not know whether she could justify her insistence on full due process protection from every possible governmental

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avoid waiving or selling the right, then what does the putative meaningful choice amount to, and what can it mean to take responsibility for it? These cases are not about the sale or waiver of rights on the part of individuals who have any options with regard to those rights." *Id.*

71. Again her attack is unrelenting. She wants to know "why should a vague but trivial right be protected by due process, but not a specific and important right?" *Id.* She cannot see any necessary relation between the incommensurability and the importance of a right. Professor Terrell argued that incommensurable rights would be ones that the bargainers could not intelligently waive. But Professor Smith wonders if the fact that they are important but clear rights offers any reason to accept their waiver. Her skepticism arises from her conviction that the notion of waiver is meaningless in the context of the illusory market choice available to the individual.

72. Such a process "requires enormous amounts of information, not to mention considerable expertise in the interpretation and evaluation of data, which poses a virtually insurmountable problem for courts as they are presently constituted." *Id.* at 402. One possible response to that critique would be to propose that the courts not engage in an actual calculation of incommensurability but rather in a hypothetical or postulative calculation. Perhaps in that way, courts could work out some kind of model as to which rights could be "bargained" away in the hypothetical market and which rights were "incommensurable."

73. *Id.* at 404.

arbitrariness. Consequently, we also do not know how far toward legalism she would be willing to have the Court take the due process clause in supposed service to the cause of legality for which the clause is presumed to stand.

VI. Due Process as a Substantive Guarantee of Procedure

Lawrence Alexander argues that "the meaning of procedural due process is determined by the various substantive constitutional values at stake when rules and policies are applied in particular cases."[74] How does he respond to the central question how to determine whether procedural due process is required in a given case? His answer is drawn directly from his premises: "*Whether* procedure is due depends upon whether substantive constitutional values are at stake."[75] Does that mean that an aggrieved citizen is entitled to a trial-type hearing? Many advocates of a free-standing right to procedure have believed that due process requires trial-type hearings. Professor Alexander strenuously disagrees. He argues persuasively that the procedure that is due varies according to what is an appropriate fact-finding procedure under the particular circumstances and with due regard to the substantive rights being determined.[76] His persuasiveness on this point is vital to the success of his theory. The requirement of trial-type hearings in every case involving substantive constitutional rights would push due process far down the road to legalism. Instead, Professor Alexander argues for a range of procedures appropriate under varying conditions, because his objective is to have due process serve the cause of legality.[77]

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74. Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. Fla. L. Rev. 323, 324 (1987). He provides several variants on his formulation: that procedural due process is substantive in nature; that there is no independent procedural value in procedural due process; that substance and procedure are intimately linked; that "a realistic concern with substance entails a concern with procedures by which rules are applied." *Id.* at 325. He believes: "A free-standing constitutional right to procedure would be a loose cannon on the jurisprudential deck." *Id.*

75. *Id.* at 330. Conversely, it also follows that, "[i]f substantive constitutional rights are at stake, then some procedures are always constitutionally required." *Id.* at 332.

76. Hence, due process may guarantee only that one is entitled to have one's ship inspected in order to determine whether the vessel is seaworthy. Professor Alexander states, "such determinations need not be made through a trial-type hearing to satisfy procedural due process" and "procedural due process is not synonymous with trial-type hearings." *Id.* at 338.

77. One advantage of Professor Alexander's position is that he avoids the problem already noted of determining precisely when procedure is due for government entitlements. He argues

In order to explain why his theory linking procedure to substantive constitutional values is universal, Professor Alexander joins Professor Mashaw in criticizing the difference in due process treatment between action under legislative rules and the absence of procedural constraints when administrative discretion is involved.[78] One possible explanation of this difference in treatment may lie in the distinction that the late Lon Fuller drew between legal rules and managerial direction. Adjudication requires legal rules, whereas managerial direction does not require general rules and operates on the basis of discretion.[79] Such governmental discretion is widespread, and Professor Fuller considered it essential to effective government operation. Although the Court has not put its approach in Fuller's terms, it may instinctively recognize that distinction on pragmatic grounds. When the administrative agency applies legal rules, judicial review of that adjudication is possible. But meaningful review of administrative discretion will be virtually impossible, because there are no established legal standards to assist in determining relevant facts and that could be applied to any facts that could be found. Clear abuse of discretion would be the only exception.

Courts have traditionally avoided such thickets in which the only possible review would be the substitution of a second discretionary decision. That judicial attitude is exemplified in the traditional reluc-

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that such views are mistaken. They postulate "that only when the government converts an optional benefit from a mere privilege into 'property' or 'liberty' does the due process clause require certain procedures . . . . The problem this position faces is developing a theory to account for when and why a mere privilege is transformed into 'liberty' or 'property' protected by constitutionally-mandated procedures." *Id.* at 339. Professor Alexander believes that the efforts both of the Court and of the commentators to formulate a theory that would provide such an explanation have been "unconvincing." *Id.* at 339. In this respect he refers specifically to Professor Terrell and disagrees with his notion that the government's "monopolistic position with respect to the benefit or its adequate substitutes should determine whether procedures are constitutionally required." *Id.* Professor Alexander wishes to quarrel with Professor Terrell, however, only if Professor Terrell is unwilling to accept the proposition that all procedural values are substantively anchored. Professor Alexander concludes: "Government monopoly is not a good argument for concern *only* with adjudicative procedures." *Id.* He does, however, criticize Professor Terrell's notion of waiver of non-monopolized privileges. In Professor Alexander's view, "waiver begs the question of what constitutional rights regarding procedure define the baseline from which waivers are or are not made." *Id.* at 339-40.

78. Professor Alexander finds the distinction the Court has made "between legislative rules and administrative discretion," puzzling. He cannot see how it can be "significant in the context of procedural due process." *Id.* at 340.

79. L. FULLER, *supra* note 18, at 207-13.

tance to review criminal sentences.[80] A similar attitude may be at work in the decisions refusing to impose restrictions on the exercise of administrative discretion. But that fact need not pose a fatal difficulty for Professor Alexander's analysis, because he argues that a sliding scale of procedures is required, the elaborateness of the process to be dictated by the substantive constitutional values involved. Professor Alexander argues that trial-type hearings are often not required by due process. Even though that kind of review is not within the realm of possibility in the review of administrative discretion, a degree of minimal due process is still provided in the right to obtain judicial review for abuse of that discretion.

Edmund Pincoffs' comment on Professor Alexander's paper offers useful clarification of Professor Alexander's thesis. Professor Pincoffs concludes that the most promising formulation of Professor Alexander's thesis is that procedural guarantees are derived from substantive constitutional guarantees.[81] More important, Professor Pincoffs asks, if Professor Alexander's thesis is correct, why was the due process clause added to the Constitution?[82] One possible answer (posed in the introduction to the present article) is that substantive constitutional values are worthless, unless they are accompanied by a due process requirement that guarantees their non-arbitrary administration. That demand seems so fundamental that we are likely to consider it implicit

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80. Sentencing decisions by trial judges were for many years virtually immune from review on appeal because they were reviewed only for the rare and extreme instance of abuse of discretion. Recent reforms in sentencing procedures have required judges to apply complex sets of rules within a strict framework and to offer written reasons to defend any departure from the set guidelines. Appeal is now, not only possible, but quite easy and has become remarkably frequent. The reason for this surge of appeals is that rule-based adjudication of sentencing decisions facilitates adjudicative review because the reviewing court can assess the persuasiveness of the reasons offered by the trial court to justify its decision. Moreover, the reviewing assessment is made in terms of the legal standards provided.

81. Pincoffs, *Commentary on Alexander: Substance, Procedure, and the Measuring of Margins*, 39 U. FLA. L. REV. 345, 346 (1987). Professor Pincoffs further reformulates this notion as the idea that "given certain substantive constitutional values, and given what is constitutionally at stake in a particular case, we have everything we need to determine whether any, and if any what kind of, procedure is due." *Id.* Even after this reformulation, Professor Pincoffs is troubled by the fact that he does not know how Professor Alexander would define a substantive constitutional value, so that he is in the dark as to what the consequences of using his scheme might be.

82. *Id.* at 348. He adds, "Is it mere redundancy for emphasis that informed the decision to incorporate the due process clause?" *Id.* at 348-49. It does seem unlikely that the framers of the Constitution were engaging in mere window-dressing in adding the due proces requirement.

in the substantive guarantees, so that making due process explicit might still seem like surplusage. Another possibility is that Professor Alexander could claim, as he sometimes seems to, that procedural due process is itself a substantive value. That sounds reasonable enough, but it has the difficulty of making unclear what his claim adds to what we already know. Professor Alexander's claim, put in that form, poses the danger of trivializing due process.

Professor Pincoffs shares that worry. Professor Alexander sees accuracy of determinations as what due process accomplishes. But accuracy is insufficient in some of the cases in which Professor Pincoffs thinks justice demands due process. He believes that due process is needed as a guarantee against arbitrariness, and mere accuracy is not necessarily a guarantee against arbitrariness.[83] He argues that our right not to be treated arbitrarily by the government should itself be considered a substantive value; therefore, procedural due process is itself a substantive constitutional value.[84] The value of legality in his view requires that non-arbitrariness be considered a fundamental value in our constitutional scheme. Acceptance of that claim should not degenerate into legalism, because legality can be sought only where legal standards are available.[85] Professor Pincoffs' concern is that we accept the avoidance of arbitrariness as a fundamental value not satisfied by mere accuracy.[86]

VII. Due Process as Fundamental Justice

Roderick Macdonald provides an instructive analysis of the Canadian Constitution's new[87] due process provision, a concept labeled "fun-

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83. *Id.* at 349. Discriminations, according to Professor Pincoffs, must be "*reasonable* ones." *Id.* That requires not merely accuracy, but non-arbitrariness. An examination of the merits of a question and not of mere form is required. There must be a relationship between form and substance.

84. Professor Pincoffs argues that our right "to be subject only to the rational application of the rules of government" is itself a claim so fundamental that it should be viewed as substantive. *Id.* at 350.

85. Thus, if governmental action does not take legal form and is instead managerial direction, the demand of legality would not apply. In this respect, we should note that Professor Pincoffs, like Professor Alexander, does not assume that "trial-type" hearings are mandated in all cases in order to avoid arbitrariness.

86. Alternatively, if Professor Alexander's claim is understood as only that the extent of procedural guarantees cannot be determined independent of the substance of the right to be protected, I believe that Professor Pincoffs would have no quarrel with that position.

87. Of the adoption of the provision, Dean Macdonald notes: "For the first time, a constitutional democracy in the common law tradition enacted a written due process guarantee without

damental justice" in their Charter.[88] Dean Macdonald's contribution serves American readers by reminding us how our concept of due process rests upon assumptions normally not examined. Two such typical American assumptions are the existence of unrestricted judicial review and the supremacy of the constitution. Those assumptions do not hold under the Canadian Charter. That fact may surprise Americans, since Canadians share, not only the common law tradition, but the common roots of our due process history in the tradition of natural justice originating in the decision of Lord Chief Justice Coke in *Dr. Bonham's Case.*[89] In the United States, that tradition was absorbed into the due process clause of the federal Constitution and of the various state constitutions. In England and the Commonwealth including Canada, those cases developed into the common law principle of natural justice that Dean Macdonald traces. Americans will be interested to note that the provision of the Canadian Charter displaced neither the common law principle of natural justice nor the previous statutory Bill of Rights.[90] Thus, the Canadian Charter provision will coexist with the common law and statutory doctrines in a complementary fashion.[91]

To this point, the Canadian courts have declined to interpret fundamental justice as augmenting procedural due process under Canadian law.[92] That situation may change in the future, but several factors deter the creative transmutation of procedural justice into a comprehensive due process clause. Most significantly, the Charter provision may be routinely overridden by a simple majority of any legislature under section 33.[93] Thus, the courts operate with the legislatures

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at the same time undergoing a political revolution." Macdonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice*, 39 U. FLA. L. REV. 217, 218 (1987).

88. The provision reads as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Constitution Act, 1982, Pt. I, § 7, Canada Act, 1982, ch. 11, sched. B (U.K.).

89. 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610).

90. Macdonald, *supra* note 87, at 230-31.

91. The Canadian situation presents the courts there with the problem of working out an accommodation between the various possible sources of due process. Their situation presents an interesting contrast to the swallowing up of common law due process by the American constitutional provisions.

92. *See id.* at 255. Dean Macdonald states: "[t]he purely *procedural* content of fundamental justice is apparently identical to that of modern day natural justice and procedural fairness." *Id.*

93. *Id.* at 250.

looking directly over their shoulders. This factor leads Dean Macdonald to conclude that natural justice as a common law principle, though invoked more cautiously, is "respected more universally by parliament."[94] At the same time, the Charter's fundamental justice is only a legislated standard,[95] and legislatures may not render it great respect.[96] The American reader will note that these trends contrast sharply with American due process practice. However, the Canadian courts have been reemphasizing the common law tradition of Lord Justice Coke in moving their due process conception more toward common law principles of legality and away from their earlier tendency toward legalism.

Jerome Bickenbach's comment on Dean Macdonald's paper seeks to take the Dean's thesis further by describing "a *distinctive* Canadian perspective on the point of the law."[97] For a Canadian, that means to state how Canada differs from the United States. Professor Bickenbach's method is to take Ronald Dworkin's distinction between principles and policies as a statement of the predominant American view of the point of law. He then contrasts the Canadian situation by noting that two different Charter provisions in the Canadian Constitution make policy superior to principle. Section 33, previously mentioned, empowers the legislatures to exempt legislation from the limits of fundamental justice. In addition section 1 has a catch-all proviso that makes the protection of rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[98] Both of these provisions mean that policy will be "constitutionally trumping principles."[99]

These aspects of the Canadian constitutional scheme will no doubt fascinate Americans, but this conflict of policy and principle is rather

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94. *Id.* at 254.

95. As such, it "does not necessarily require its own justification. Courts may well be tempted, in consequence, to treat it as fiat." *Id.* at 264.

96. These factors may explain some trends in early Charter cases, summarized by Dean Macdonald. He notes that "the Court has already rejected its own legalistic Canadian Bill of Rights jurisprudence: it has consistently pursued a generous interpretive strategy more in keeping with the methodology of the common law." *Id.* at 265. Moreover, the Court "has made a concerted effort to weave the Charter into Canada's existing constitutional arrangements. That is, the Court accepts that the ultimate authority of the Charter flows from common law constitutional principles." *Id.* at 266.

97. Bickenbach, *Commentary on Macdonald: The Principles of Fundamental Justice — Prospects for Canadian Constitutionalism*, 39 U. FLA. L. REV. 269, 270 (1987).

98. *Id.* at 275.

99. *Id.*

different from Dworkin's theory of the proper judicial role.[100] Dworkin's normative theory would be violated if courts were to make policy decisions, and the Canadian constitutional scheme does not anticipate asking courts to do any such thing. In fact, both Dean Macdonald and Professor Bickenbach emphasize the strong Canadian tradition of non-political judicial decisionmaking. The constitutional provisions Professor Bickenbach discusses do not alter that judicial responsibility; they simply provide limitations in which the legislative decision will take priority over a possible judicial one. An argument similar to Professor Bickenbach's could be made in the United States, because the Constitution gives Congress power to make exceptions and limitations to the jurisdiction of the federal courts. That potential for limiting the scope of judicial review could be offered as an example of policy trumping principle in our system. But American commentators tend to be upset by the notion of such legislative limitations on the scope of judicial review. Hence, the fact that the Canadian legal-political tradition accepts such legislative strictures on the scope of judicial action does provide Professor Bickenbach with a legitimate claim to have stated a distinguishing feature of the Canadian legal tradition.

Jennifer Sharpe's valuable commentary provides an interesting overview of due process developments in Australia. Australia has a constitution with judicial review, but the constitution contains no Bill of Rights and no due process clause. Consequently, all procedural due process there is meted out under common law principles of natural justice. Recent statutory developments have augmented available due process review.[101] Coinciding with these statutory developments, Professor Sharpe traces a broadening of the traditionally narrow view of natural justice in the Australian courts similar to the Canadian development that Dean Macdonald traces.[102] In the process of this judicial

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100. R. DWORKIN, TAKING RIGHTS SERIOUSLY 82-90 (1978).

101. The most interesting is the Administrative Appeals Tribunal, which provides a general review by an independent tribunal of a wide range of administrative decisions. Nonetheless, Professor Sharpe notes that "it has become apparent that there are a large number of administrative decisions that are unsuitable for review by an independent, appointed tribunal." Sharpe, *Commentary on Macdonald: Qualifying Justice — Procedural Due Process in Australia*, 39 U. FLA. L. REV. 281, 283 (1987). It seems likely that this category of cases consists of discretionary determinations in which legal rules are not formulated and therefore their application cannot be reviewed. The other major development is the Administrative Decisions (Judicial Review) Act, which provides for judicial review in the Federal Court of Australia of a wide range of administrative decisions. *Id.* at 285-86.

102. Professor Sharpe notes that "Australian Courts have slowly moved away from" traditional requirements. *Id.* at 287.

broadening of the scope of natural justice, a variable concept of due process has emerged that is responsive to the concern raised by Professor Alexander.[103]

Despite all of this growth of procedural due process in Australia, Professor Sharpe notes that a number of the provisions now taken for granted in the United States under the Administrative Procedure Act have not been adopted in Australia. For example, the scope of judicial review is still rather limited in comparison with the expectations we have under our constitutional tradition. The Australian quest for legality has made some strides, but is still hampered at least to some degree by the Australian tradition of legalism.[104] The overall parallels in the expansion of due process in Australia with both Canada and the United States create a notable phenomenon. It is coincident with increasing societal complexity and the exponential growth of governmental regulation in modern industrial society. In the face of such overwhelming government power, any democracy with even somewhat liberal tendencies will find it well nigh impossible to resist the pressure to provide protection for the ordinary citizen from the abuse of governmental arbitrariness.

VIII. Due Process as a Civil Procedure

Winston Nagan's contribution reminds American lawyers of the foundation of civil procedure that make our concept of due process meaningful. In the midst of our constitutional preoccupation with due process, Professor Nagan undertakes to help us recall that the fundamental underpinnings of due process lie in the common law heritage of our rules of civil procedure. Being so reminded of our common law roots, we discover we are not quite as different from Canada and Australia as we first thought. Professor Nagan also proposes to challenge the sincerity of our exposition of the fairness we claim to be the goal of due process. Thus, he contrasts the ideal of fairness presented in the state extraterritorial jurisdiction cases with the apparent compromise in the Court's acceptance of creditor self-help provisions. Professor Nagan's skepticism in light of the Court's apparent lack of good faith in the bill collector cases leads him to describe the dedication

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103. *See id.* at 289-90. Professor Sharpe states: "The duty of fairness may be satisfied by informing an affected person of the contents of relevant reports or by providing a summary of information intended to be taken into account, coupled with an opportunity to make written submissions before a final decision is reached." *Id.*

104. *See* Moffat, *Philosophical Foundations of the Australian Constitutional Tradition*, 5 Sydney L. Rev. 59, 87-88 (1965).

to fairness in the state court jurisdiction cases as a "great myth system of due process of law in civil litigation."[105]

Professor Nagan also addresses the substance/procedure distinction on the ground that viewing ideal procedural rules as neutral with regard to substantive ends is a type of legalism.[106] Instead, he claims the two must be viewed in interaction, a point made by other contributors including Professor Alexander. However, Professor Nagan argues that determinations as to what is procedural and what is substantive should be made entirely on the basis of what is deemed in the common interest. That criterion seems too vague.[107] Granted that precision is not possible here, the criterion used to judge the substance/procedure interrelation should be the overall goal of the process, which is legality. Professor Nagan may leave some readers uneasy on this point, for he appears to reject the notion that procedure should secure substantive justice.[108] But he wants to make us aware that the relation of substance and procedure and the task of achieving justice is more complex than we are prepared to admit.[109] Professor Nagan's object is to show how, despite complexity, civil procedure can come closer to living up to its goal of rationality,[110] an achievement essential if due process is to secure greater legality.

Toni Massaro takes seriously Professor Nagan's condemnation of the lawyer's perspective on the fairness of civil procedure and joins in pursuing the observer's perspective as the way to evaluate the justice of procedural rules.[111] She takes as a case study for this purpose the lawyer's advantage protected by the workproduct rule of *Hickman v. Taylor*.[112] That rule frequently puts noninstitutional litigants at great disadvantage in obtaining the discovery that would enable them

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105. Nagan, *Civil Process and Power: Thoughts from a Policy-Oriented Perspective*, 39 U. FLA. L. REV. 453, 468 (1987).

106. *Id.* at 471.

107. *Id.*

108. Regarding the view that the objective of civil procedure is to vindicate substantive justice, Professor Nagan comments that "this seems like putting the proverbial cart before the horse." *Id.* at 480.

109. *See id.* at 483. Professor Nagan notes that "an accurate description of our civil procedure system is that it maintains a low visibility aspect of constitutional law in the broad sense that the values of fairness, equality, and reasonableness are at least assumed to undergird the diverse and complex rules." *Id.*

110. *Id.* Professor Nagan states: "Optimally then, the rules of civil procedure aspire to 'rationality'." *Id.*

111. Massaro, *Commentary on Nagan*, 39 U. FLA. L. REV. 497, 498 (1987).

112. 329 U.S. 495 (1947).

to pursue their claims effectively,[113] a result clearly unjust in Professor Massaro's view. Although she remains perplexed as to what a law teacher should do about it, she supports Professor Nagan's call for extensive and thoroughgoing re-examination of the principles of procedure in order to secure the fairness that is the object of the system. The legalistic attitude that rules such as the workproduct doctrine generate among lawyers rightly worries Professor Massaro. Clearly a legalistic mentality is inconsistent with the struggle for legality.

Those readers who believe that the best material is usually found in the footnotes will take particular delight in the exchange carried on in the footnotes between Michael Bayles and Professor Nagan. Professor Bayles is unwilling to accept Professor Nagan's dichotomy of critical standpoints that requires siding either with the ideal observer or with the lawyer. Professor Bayles believes that a superior standpoint for judging the fairness of procedural rules would be to view them as a potential litigant. Presumably, this potential litigant is also an ideal observer, combining both the objective search for justice and the practical interests of a potential participant in the process.[114] Professor Bayles states a persuasive case for his claim, examining several procedures the fairness of which seem to be clarified from the viewpoint of the potential litigant. We cannot know, however, whether Professor Nagan would disagree. That answer will have to wait until their debate continues. Regardless, Professor Bayles does not reject Professor Nagan's "call to examine how the system actually works."[115] Though Professors Bayles and Nagan appear to be divided as to how to achieve the goal, they both believe that our goal should be procedural rules that are optimal in achieving legality. They both agree that our procedural rules require detailed scrutiny in light of the fundamental objectives of procedural due process.

IX. CONCLUSION

The contributions to this symposium exhibit the wide diversity one would expect in such an interdisciplinary setting. Philosophers commenting on lawyers' substantive papers is novel. How did the experiment turn out? Overall, I rate the philosophers' critiques as a success. They raised questions somewhat different from those that legal commentators would have asked. More important, the lawyers were pres-

113. Massaro, *supra* note 111, at 499-500 & n.10.
114. Bayles, *Commentary on Nagan*, 39 U. FLA. L. REV. 491, 493 (1987).
115. *Id.* at 496.

sed to respond to new questions, thus extending their analyses. However, we should not overlook a different sort of interdisciplinary character of the contributions, for the contributors are not all teachers of constitutional law. A variety of legal specialties is represented: civil procedure, criminal procedure, and administrative law, as well as constitutional law. Thus, we have the advantage of views of due process from a number of disciplinary vantages, providing a much broader perspective on due process than we would find among discussants versed only in constitutional law. Significantly, this broader perspective helps to make clearer the twin challenges for due process: to avoid the trap of legalism and to secure the objective of legality.