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Thomas Barton

West Virginia University College of Law

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“THE CONSTITUTION OF THE BUREAUCRATIC STATE”—A RESPONSE TO PROFESSOR TUSHNET

THOMAS BARTON*

As social description and legal analysis Professor Tushnet displays in this article true insight.¹ The conceptual framework of politicized, rationalized, and professionalized bureaucracies is of great assistance in understanding many modern Constitutional decisions. Tushnet’s vision of the motives and sensibilities of bureaucratic superiors is distressingly reminiscent of those portrayed in Joseph Heller’s *Something Happened*,² and I fear it is accurate. The enumerated institutional and doctrinal incentives to rationalization and professionalization also undoubtedly exist. Indeed, additional incentives arise from the multitude and diversity of distributional decisions that must be made in a national welfare system.

As political agenda, however, the article is both less explicit and less convincing. Suppose that all is as Professor Tushnet describes. Suppose that bureaucratic superiors allege, and courts believe, that welfare system administrative decisions are far more rationally and professionally made than experience suggests is actually the case; that such fictions serve to protect bureaucratic superiors and to control bureaucratic subordinates; and that judicial acceptance of the fictions leads to the creation of Constitutional doctrines that create incentives for the fictions to become reality. Yet neither fictions nor their judicial acceptance are necessarily evil or even undesirable. Indeed, Lon Fuller³ has described fictions as the theoretical waystations of progressive legal thought. What then should compel advocacy for a repoliticized bureaucracy?

The Tushnet agenda may or may not be compelled by concerns that current decision-making is remote or disregarding of human dignity. Certainly the article reveals an abiding interest in the well-being of welfare recipients. On the other hand, Tushnet rejects proposals advanced by Professors Michelman and Mashaw that attempt to respond to the degrading and impersonal methods by which welfare decisions are made. Michelman and Mashaw suggest that by enhancing recipient participation in the decision-making, welfare system “process values” can be made more humane. However, neither the Michelman nor the Mashaw alternative is viewed by Tushnet as accomplishing much beyond providing occasional “good feelings” in recipients. He writes: “[T]he interest in winning will usually be overwhelmingly larger than the interest in good feeling.... Thus the increment that the participatory interest contributes to the [utilitarian] balance seems to me likely to be small.”⁴ Indeed, Tushnet’s opposition to the Michelman and Mashaw participatory alternatives exceeds mere skepticism about their effectiveness. First, he feels that enhanced

* Associate Dean for Academic Affairs and Professor of Law, West Virginia University College of Law.

¹ Tushnet, *The Constitution of the Bureaucratic State*, 86 W. VA. L. REV. 1077 (1984).

² J. HELLER, *SOMETHING HAPPENED* (1974).

³ L. FULLER, *LEGAL FICTIONS* (1967).

⁴ Tushnet, *supra* note 1, at 1114-15.

participation may be *counterproductive* to enhanced benefits receipt, and therefore efforts at restructuring may not be worthwhile: "If more procedures are required, less of those [welfare state] things will be done. And many of them serve nonutilitarian ends. It is not obvious how one could properly resolve the conflict between doing more nonutilitarian stuff and providing more nonutilitarian procedures."⁵ Second, and perhaps more importantly, he appears to dispute the ethical foundation of the *efforts* to design more humane procedures: "[U]nder no sensible moral theory is process in itself a value."⁶ Therefore, his call for a repoliticized bureaucracy does not appear rooted in ethical or humanitarian objections to the welfare system decisional process.

Nor, despite much suggestion to the contrary, is what compels the political agenda that current bureaucratic decisions actually proceed from elitist and sophomoric "professional" judgments, for that is the essence of the fiction: "On the level of immediate experience we know that bureaucracies are shot through with deskilled employees, that superiors make decisions based on personalities, that beneath the surface of bureaucratic rules lies a dense network of personal associations that is what really let the bureaucracy operate."⁷

Nor, finally, is it necessarily that fewer deserving or needy individuals are provided with resources by reason of the existing system, as supplemented by Constitutional doctrine. On the contrary, the *Goldberg v. Kelly* creation of property-like entitlements removable only through due procedures may well have added substantial and needed protection to welfare recipients. Nowhere does Tushnet disavow *Goldberg*. Rather, he states, "recipients of public assistance lack substantial political power and must call on the courts for aid in controlling the bureaucracy."⁸ Hence, *until* the realities of political power change, welfare recipients benefit from a rationalized or professionalized, rather than politicized, bureaucracy.

Tushnet's argument contains, therefore, the following paradoxes: (a) out of concern for welfare recipients, a system of bureaucratic decision-making is attacked that enhances their benefits both absolutely, and relatively to the author's suggested alternative system of distribution; and (b) the existing system is criticized for a rationalization and professionalization that do not *actually* exist, but (because of incentives created in the courts) that may increasingly *come to exist* the more the system is attacked. The paradoxes can be neatly resolved through two theories, both of which call for fundamental changes in our society. I cannot be certain whether either theory is actually embraced by the call for a repoliticized bureaucracy. On the other hand it is difficult to conceive alternative mechanisms by which more politics translates into Tushnet's goal of recipient empowerment.

⁵ *Id.* at 1116.

⁶ *Id.*

⁷ *Id.* at 1114.

⁸ *Id.* at 1082.

The first theory that could resolve the paradoxes is classic Marxism. According to this theory, a system that incrementally improves the lot of the oppressed class is to be avoided as an "enrichment of slaves" that stifles proletarian revolution. Democracy offers only illusory, bourgeois freedoms that retain intact the class structure. Suggestions of this approach appear in Tushnet's text: "[Welfare state bureaucracies] serve functions of social containment...."⁹; and "Eliminating politics from the [welfare recipient] branch may have the effect of diffusing potential threats to political stability...."¹⁰; and in a footnote, the suggestion is made that a major reason for the existence of the welfare state is to buy sufficient domestic stability to retain American "hegemony over the world capitalist economy."¹¹ If in this article the vision of a repoliticized bureaucracy entails deliberate regression to a corrupt, racist, and arbitrary machine as a manipulative device to unite the rage of welfare recipients in a revolutionary political accord, I reject the first move. Moreover, I seriously doubt that Professor Tushnet has any such political agenda, however much it may be inferable from some of the rhetoric.

The second theory by which the paradoxes of Tushnet's argument can be resolved leads to policies that offer far more appealing prospects: it deals with the impact of "professionals" on social change and individual autonomy. This theory is best known in the work of Ivan Illich, especially his *Toward a History of Needs*.¹² In the context of a national welfare system, Illich would attack the underlying assumptions of a rationalized, professionalized bureaucracy: namely that social redistribution is best accomplished by welfare institutions; that such institutions should be staffed by professionals who "help people" by dispensing entitlements or by making allocative decisions guided by expert judgment; that increased use of the institution and its personnel would result in a more just society; and that if the welfare system operates unfairly it must be made yet more rational and professional. The difficulty is not that professional judgment cannot exist or is prone to inaccuracy; the problems are rather that the existence of professional judgment tends to create institutions which become dependent on such judgment, and that those institutions in turn create "needs" in people for whatever the institution provides. Certainly, as Tushnet states, many alleged professionals have become "de-skilled" by their institutions. What perhaps is more serious is that those same persons deskill *others*: professionals and their judgments impoverish and make passive and ineffectual those who make use of them. The impoverishment of welfare recipients can be quite literal, as they may be forced to relinquish personal assets and forego opportunities at employment and self-development as conditions to their receipt of welfare assistance. The impoverishment of the *courts* is more figurative. As Tushnet explains, judges abdicate their powers and responsibilities of Constitutional

⁹ *Id.* at 1080.

¹⁰ *Id.* at 1082.

¹¹ *Id.* at 1081 n.13.

¹² I. ILLICH, *TOWARD A HISTORY OF NEEDS* (1980).

interpretation at the feet of bureaucrats whenever professional norms are held to be synonymous with substantive law.

It is conceivable, therefore, that when Tushnet argues for “repolitization” of the bureaucracy, he is not so much arguing for a political class struggle as arguing *against* abdication by both the courts and welfare recipients of their powers to articulate and shape social welfare policy. This sort of “participation” differs from that suggested by Michelman and Mashow. First, participation by recipients under this repolitization theory does not substitute for or exclude the substantive involvement of the courts. As the article points out, “even old-fashioned [political] bureaucracies must comply with the substantive provisions of the Constitution.”¹³ Second, the involvement of recipients would be as a community rather than individuals, and would proceed at the level of policy rather than particular allocative decisions. The policies and procedures that would emerge from this sort of shift from control by rules and professional norms to control by politics is not immediately clear. Yet if what is advocated is a revitalized role for the courts as well as recipients, it is a political agenda worth considering.

¹³ Tushnet, *supra* note 1, at 1097.