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The Constitution of the Bureaucratic State--A Response to Professor Tushnet

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"THE CONSTITUTION OF THE BUREAUCRATIC STATE"—A RESPONSE TO PROFESSOR TUSHNET

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As I understand Mark Tushnet,[1] the goal that he would most like to see accomplished is an elimination of the necessity of having welfare state bureaucracies in order to meet certain basic human needs. A redistribution of wealth in the form of a guaranteed annual income, for example, would make it unnecessary for social service agencies to determine who is qualified to receive various discrete items of subsistence; and the formation of neighborhood patrols could relieve police departments of functions that sometimes place them in conflict with innocent individuals and groups in the communities that they are supposed to be protecting. To the extent that such drastic changes could be brought about through democratic political processes, I would also support them. The difficulties that I have with Tushnet concern his approach toward reforming the existing bureaucratic system.

The present system needs reform, according to Tushnet, because the courts are unwilling, and perhaps unable, to deal effectively with the realities of contemporary bureaucratic behavior, in which "street-level professionals" are often required (by inadequate resources and the number and complexity of decisions they must make) to disregard professional norms, and where established substantive and procedural rules are frequently a facade for much more personal kinds of decision-making. The principal "remedy" he suggests—intended apparently to tilt the scales in favor of liberality—is the political empowerment of a bureaucracy's clients, in the sense of giving particular individuals who have disputes with the bureaucracy a greater measure of "authority over" its decisions.[2] The question for me is whether this approach would not simply make a bad situation much worse.

Tushnet's example of the kind of empowerment he has in mind concerns the expulsion of students for misbehavior in school:

> Instead of trying to work out the right procedures for kicking kids out of school, we might give the students charged with misconduct, or their parents, the power to veto any proposed disposition. Then the conversation between the student and the principal would be a real one, not a disguised "cooling out the mark." We might hold in reserve an incredibly formal system of hearings, as an inducement to the student and principal to work out a mutually satisfactory disposition, and as a resource if their conversation breaks down. In the hearing, of course, both the student and the principal would have to be at risk. Now, I know that there are tough kids who ought to be kicked out of school, but they still could be. And, though the proposal is modestly utopian, we ought to consider that the conversation it promotes might be at least as educationally valuable as what goes on in schools today.[3]

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

[2] *Id.* at 1117.

[3] *Id.* at 1117-18.

The first problem that I see with a proposal of this sort is its propensity to be quite counterproductive in terms of liberality. Tushnet finds traditional due process safeguards inadequate because one usually cannot believe that "the client's say has added anything to what the decision-maker as a well-intentioned and sensitive person would have done anyway."[4] For Tushnet, bureaucratic good intentions and sensitivity can apparently be taken more or less for granted, and we can go on from there to correct other deficiencies. My own view is that such positive attitudes are already in too short supply and are quite susceptible to being lost. Ironically, the implementation of Tushnet's proposals could make them still less prevalent.

The school misconduct procedures that Tushnet proposes call for a willingness on the part of the principal concerned to invest much more of his or her time in disciplinary functions, with less left for other educational pursuits; they assume that the principal who is to be put "at risk" will not be appalled at choosing between doing what he or she believes is right institutionally and living up to his or her responsibilities to family or others; they assume a large measure of indifference on the part of the principal as to whether he or she is engaged in helping behavior or in hostile confrontations; and they encourage the taking of extreme adversary negotiating positions, to offset the anticipated recalcitrance of the other side, rather than the proposing of dispositions on the merits.

Official dispute resolution procedures with such characteristics, particularly when coupled with relatively low bureaucratic salary levels, would I think lead many well-intentioned and sensitive people to seek safer and more congenial positions in private organizations, and cause a conscious or unconscious hardening of the attitudes of many of those who remained in government. Thus, Tushnet's procedures could produce a situation that I doubt that he himself would be prepared to accept: welfare state bureaucracies staffed to a much greater extent by people with attitudes resembling those of public prosecutors.

There are, of course, alternative ways in which some bureaucrats would react at least some of the time, ways that would indeed represent greater liberality. Where the very existence of a dispute depends on some enforcement action that is legally or in fact in the discretion of an official, he or she may simply decide to do nothing—either because pursuing the matter might be too risky or distasteful personally, or because it would seem in view of the professional distractions involved to be disutilitarian institutionally. (One wonders how prevalent this kind of reaction is even today, when officials are confronted with due process procedures significantly more elaborate than the informal steps mandated for school discipline by the Supreme Court in *Goss v. Lopez*.) An official might believe that a proposed disposition that he or she felt was "reasonable" or gave the client "the benefit of the doubt" would readily be accepted, only to discover later that further concessions were necessary for an agreement to be reached. And, in the course of negotia-

[4] *Id.* at 1117.

tions, special consideration might well be shown to clients who were either especially cooperative or especially nasty, depending on the personality of the particular official.

Perhaps Tushnet is counting on our ability to find and attract to bureaucratic employment a different kind of well-intentioned and sensitive person who could be relied upon not to react in any of the extremely liberal or extremely illiberal ways that I have described; if so, I honestly cannot imagine who that would be. And I am equally skeptical about our capacity to create systematically such a "new man," when even the most powerful and socially pervasive of recent totalitarian cultures have failed for the most part in such efforts. If my skepticism is justified, a second problem with Tushnet's proposal is apparent: his emphasis on negotiation with all of its vagaries, instead of adjudication which at least attempts to limit bureaucratic discretion, would in all likelihood only exaggerate the unequal treatment of clients that results from the present system's too frequent neglect of rules and professional norms.

Finally, if one is sympathetic, as I am, with the objective of greater liberality for clients generally, I think one needs to consider whether Tushnet's basic approach, which treats the interests of individual-client disputants as synonymous with the interests of the client groups to which they belong, would not be altogether inappropriate in certain characteristic bureaucratic situations. Individual students, prisoners, patients in mental hospitals, and other citizens can find themselves in conflict with bureaucracies precisely because they have behaved antagonistically toward their fellow clients. And bureaucrats are often faced with the choice of allocating scarce resources of money, time, and professional attention either disproportionately to particular clients or more productively to the client group as a whole. In both of these situations, the attainment of greater liberality for individual disputants, through their political empowerment, would simply mean less for everyone else.[5]

Tushnet has pointed out some very real deficiencies in our present bureaucratic system; but I would prefer to see them addressed through more traditional, as it were, liberal means. The "revolution" of reprofessionalization that Tushnet cites as another possible approach[6] is already manifest in strikes by legal aid attorneys, teachers, and others against unprofessional working conditions. And the notion from the nineteen-sixties of giving client representatives a significant measure of policy-making and supervisory power over bureaucracies still seems to me an entirely viable concept.

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[5] A related problem under Tushnet's approach would arise where an agency's responsibilities run to more than one category of clients, with sometimes conflicting interests—as in child custody matters. In a particular dispute, are the individual child, the natural parent, and foster parents all to be given vetoes over a proposed disposition? If not, who should be so empowered? Of course, similar problems would arise in the context of the group empowerment that I would favor.

[6] Tushnet, *supra* note 1, at 1117.