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Comentary on Terrell: Definition and Metaphor in Legal Analysis

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COMMENTARY ON TERRELL: DEFINITION AND METAPHOR IN LEGAL ANALYSIS

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Professor Timothy Terrell's most recent article,[1] on which this comment is based, is a refinement of his overall view,[2] and as such is concerned to correct a particular theoretical defect within that framework. Thus, he invites us to join in his project, and discuss the pros, cons, and possibilities of achieving theoretical closure in the way he proposes.

However, the most interesting questions about Professor Terrell's theory are raised by two major features, both of which are fundamentally important, controversial, and presupposed in his current work. Both features raise basic issues about what constitutes legitimate legal analysis and constitutional interpretation, as well as significant questions about the proper role and function of courts. The first of these features is Professor Terrell's positivistic approach to legal analysis in general. The second is his market model of due process adjudication. Both deserve careful treatment, but there is no way to do justice to both in a short space. So I shall make only a few cursory remarks about positivistic legal analysis, and focus the bulk of my commentary on the market model of due process.

I. THE POSITIVIST APPROACH TO LEGAL ANALYSIS

Certainly Professor Terrell should be commended for his bravery. Not only does he undertake by and large to defend the present posture of the Court in entitlement cases since *Roth*,[3] a rather unpopular cause

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1. Terrell, *Liberty and Responsibility in the Land of New Property: Exploring the Limits of Procedural Due Process*, 39 U. FLA. L. REV. 351 (1987).

2. *See, e.g.*, Terrell, *Causes of Action as Property*: Logan v. Zimmerman Brush Co. *and the "Government-as-Monopolist" Theory of the Due Process Clause*, 31 EMORY L.J. 491 (1982); Terrell, *Liberty: The Concept and Its Constitutional Context*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 545 (1985); Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1982) [hereinafter *Due Process*]; Terrell & Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985).

3. Board of Regents v. Roth, 408 U.S. 564 (1972). The line is generally considered to begin with Goldberg v. Kelly, 397 U.S. 254 (1970). For a perspicuous but brief summary of this line of cases, see Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

at present, but he also undertakes his defense by appeal to positivist legal theory,[4] a rather unpopular view among legal scholars. In fact, often to be called a positivist by a legal scholar is to be insulted. Of course, this is not universally true, and certainly it is not true among philosophers. To be called a positivist by a philosopher is simply to be described in terms of one's methodological proclivities. In that descriptive sense Professor Terrell is a positivist. Moreover, Professor Terrell is not only a positivist, he is also positive, that is, he is affirmative. Professor Terrell is optimistic about the possibility of organizing and unifying the opinions of the Court in terms of a theoretical framework that can systematize, explain, and justify them and provide guidance for future decisions.

There are real advantages to this sort of approach. First, it is manageable. It calls for moderate reform, workable revision, on the part of the Court. Professor Terrell's suggestions could even be described as refinement of the Court's currently held view. He does not demand abdication or wholesale reversal of an entire line of cases. It could be objected that if the entire approach is wrong, then abdication is what is needed, but that may not be very realistic. In fact, abdication does not often occur. Given that, someone who does not agree with Professor Terrell, in theory, might consider his view the best practical option because of its realism. Finally, his view is helpful. Professor Terrell takes the Court's present theory, such as it is, and asks how it can be made coherent, accessible, supportable, and predictable. He takes the situation as it is and asks how it can be improved, or even redeemed. Clearly there are problems with the Court's present approach. How can these problems be corrected?

One way that Professor Terrell hopes to improve the analysis of the Supreme Court and indeed of all courts is to provide a methodology for analyzing fundamental legal concepts.[5] This is certainly needed. Courts engage in conceptual analysis all the time, perhaps unavoidably so. Professor Terrell develops a method based on the views of Professors Hart[6] and Honore,[7] which involves formulating a paradigm based

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4. Positivist legal theory developed largely through the work of J. Bentham, J. Austin, H. Kelsen, and H.L.A. Hart. *See, e.g.*, G. CHRISTIE, JURISPRUDENCE (1973) for a fine historical account.

5. Professor Terrell's method is developed throughout his work, *see* sources cited *supra* note 2, but its fundamentals are set out in *Due Process*, *supra* note 2.

6. H. HART, *Definition and Theory in Jurisprudence*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 19 (1983).

7. HONORE, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107 (A. Guest ed. 1961).

on common use, for purposes of defining terms or concepts, that can then be modified and developed by appeal to theory.[8]

There is a great deal that deserves discussion here, but I will not attempt to discuss it all. I will only observe on the most general level that this sort of approach, the positivist conceptual analysis, has been highly extolled, stridently criticized, and widely ignored. The whole gamut of possible reaction is actual. In general defense of this sort of approach, it might be said that critics who object to positivistic approaches, in terms that apparently reject conceptual analysis, are very puzzling, since it is hard to imagine what alternative approach courts are supposed to employ.[9] Thus, criticisms cannot be aimed at conceptual analysis as such.

It is obvious that some conceptual assumption will be used by courts either consciously or not. Law is manifested in language. The words have to mean something. Some definition will be employed. Some meaning will be relied on either expressly and with self awareness, or implicitly and without it. If that is true, if conceptual analysis at some primitive level is unavoidable, it seems reasonable to have a method. In fact, it seems more reasonable to have a method than not to have one, and it seems more reasonable to engage consciously in conceptual analysis than to rely on unreflective assumptions of meaning. So attempting explicit conceptual analysis is reasonable; not easy, but reasonable.

Accepting the above premise, what is the merit, if any, in objection to positivist conceptual analyses? Before considering the meritorious objection it should be noted that a theory like Professor Terrell's is more an answer to this objection than an object of it. The general objection that has merit follows.

First, it may be objected that actual linguistic analysis is a complex enterprise that requires a great deal of data, teams of researchers, and considerable technical expertise in the interpretation and analysis of the data, not to mention the theories. For example one must consider semantic, syntactic, and speech act theories, all of which are exceedingly controversial and unsettled. Linguistic analysis of law is not less

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8. *See Due Process, supra* note 2.

9. What should be recognized is that positivist conceptual analysis generates controversy rather than settles it. See in general the work of F. Schauer regarding the indeterminacy of legal language and problems of interpretivism. Or consider the more specific objections of J. ELY, DEMOCRACY AND DISTRUST (1980). Ely argues (inter alia) that the concepts of life, liberty, and property should be considered together rather than separately in interpreting the due process clause. This is an interpretation problem, indeed a semantic problem, of great significance. Can it be settled by linguistic analysis?

complex than linguistic analysis of any other domain of discourse.[10] Consequently, courts are in no position to engage in it seriously. If they are not engaging in serious conceptual analysis, then what are they doing? They are applying their own linguistic intuitions and assuming that those intuitions are representative of common use. Courts are also making educated guesses about conceptual meaning based on slim data found in judicial opinions in related cases not assembled for the purpose of linguistic analysis. Furthermore, courts are representing this as conceptual analysis of objective data leading to determinate conclusions derived from the objective meaning of the terms: the language of the law. Property means *X*. If no property, then no due process. *X* is not present, therefore, no due process. Q.E.D. The conclusion is clear and unavoidable. It is derived from the meaning of the words, and the words are right there on the page. It cannot be any other way.

The positivist will say that this is abuse of the theory, and it is. But the critic will claim that the theory is much too susceptible to just this sort of abuse. Judicial opinions assume the Q.E.D. mode entirely too often when putative conceptual analysis is used explicitly. Even Professor Terrell calls it the analysis of objective data.

So one criticism that should be kept in mind is that courts are not often, if ever, in a position to engage in conceptual analysis on a sophisticated level, or even with much care. But using the terminology, style, and form of conceptual analysis without engaging in the actual practice at any exacting level creates the illusion of certainty and expertise when in fact neither is present nor practically available.

This is indeed a telling criticism. It should be emblazoned on plaques and hung in chambers to serve as a constant warning to judges forever. And yet, this objection does not expose a fatal flaw. Thus, the objection ought to be considered as the basis of a caveat and not a refutation. Here is why.

First, it is not clear that conceptual analysis is avoidable, and if it is somehow avoidable in some sense, it probably is not desirable to eliminate it. That point has already been argued, and it still holds. Second, the problem of expertise is not an all or nothing matter. For example, it is not like heart surgery. If you are not antecedently qualified, if you are not trained as a heart surgeon, you will not be allowed to perform surgery. The chances are too great, even in an

10. For a critique of Hart that illustrates the complexity involved in taking a positivist view like Hart's, see Shuman, *Jurisprudence and the Analysis of Fundamental Legal Terms*, 81 J. LEGAL EDUC. 437 (1956).

emergency, that you will make things worse rather than better. Conceptual analysis is not like that. Law is, but conceptual analysis is not. The novice analyst is more like someone who needs to be able to paddle a canoe or perhaps better, to navigate a boat across a body of water to reach an important destination. Assume that everyone has some acquaintance with boats, as one does with words. At least our novice has seen a boat, unlike the would-be heart surgeon. How many of us have seen a heart?

So, there is some connection between the task faced and ordinary living experiences that have given the novice a potential foothold. The foothold, however, may be minimal. If the novice has only seen a boat, then he will be very clumsy and make mistakes. He will have accidents, possibly serious ones, and he will almost certainly fail to reach the destination at which he aims. But again, this is not an all or nothing matter. Knowing a little is better than knowing nothing. A little skill is better than none. A fair amount is that much better. And if our navigator is formally trained and highly experienced, he should be able to sail through the task with authority and grace, avoiding pitfalls with style, and arriving precisely at his intended destination, or at least closer to it than anyone with less skill.

Of course, it does not follow that he will select the right destination. It only follows that he will not miss his mark or be thrown off course from lack of skill, but that in itself is worthwhile. Furthermore, it is better, if it is not an all or nothing proposition, to be closer to one's object rather than farther away. Finally, skill is acquired with practice, especially if there is a method, such as that proposed by Professor Terrell, that promotes self evaluation, sophistication, and objectivity. So although this objection is a serious one, it does not undermine Professor Terrell's general suggestion for the use of an exacting positivistic conceptual analysis.

However, this very objection holds much more strongly against the use of a market model of due process adjudication. First, the ill effects of misuse of economic analysis are equal to any bad effects of poor conceptual analysis. Second, the problems associated with expertise are more acute. Finally, the possibility of avoidance is greater. Not only is the economic analysis of certain areas of law avoidable, in many areas it appears inappropriate. Due process is at least arguably one of those areas.

II. The Market Analysis of Due Process

The purpose of the due process clause, according to Professor Terrell, and many others, is to promote fairness to individuals by acting

as a constraint on governmental power.[11] This is necessary because of the imbalance that occurs in various circumstances where a relatively powerless individual is faced with the prospect of bargaining with or dealing with large, powerful, impersonal institutions or agencies. Professor Terrell argues, however, that the Constitution, and more specifically the due process clause, is only one source of constraint on government. Where other constraints operate, then "there will be a set of cases in which governmental arbitrariness should be constitutionally permissible because some other effective, extra-constitutional constraint operates on government to make the protection of due process unnecessary . . . ."[12] The counterbalance that Professor Terrell proposes is the market. This is a laudable suggestion, if it works. It makes good sense to find an extra-constitutional constraint on government because judicial review is costly and inefficient. Judicial review is also generally frustrating for all parties, whether governmental representatives or private individuals. Thus, it should always be considered as a last resort. If something more efficient replaces judicial review, so much the better for all concerned. But why should we think the market can do that? In what way is the market a constraint on governmental arbitrariness?

Let us suppose, for the sake of argument, that Mr. Roth,[13] Mr. Bishop,[14] or Mr. Kennedy[15] was dismissed from his job arbitrarily, either through negligent error or abuse of power. What would be the purpose of due process in such a case? Why, if at all, would it make sense to have it?[16] Presumably, 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. In short, an initial purpose would be deterrence. If governmental agencies know they are subject to external review, then it is at least reasonable to assume it would influence their behavior. It is likely agencies would be more careful and honest, and thus less arbitrary. Failing that, if arbitrariness does occur, the purpose of due process would be to pro-

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11. Terrell, *supra* note 1, at 368-69.

12. *Due Process*, *supra* note 2, at 902.

13. *See* Board of Regents v. Roth, 408 U.S. 564, 566 (1972). Mr. Roth was a nontenured professor at a state university.

14. *See* Bishop v. Wood, 426 U.S. 342, 343 (1976). Mr. Bishop was a policeman.

15. Arnett v. Kennedy, 416 U.S. 134, 152 (1974). Mr. Kennedy had a civil service job.

16. This is not to claim that due process should or should not in fact apply in these cases. Many factors are relevant to that issue. This is merely a discussion of one purpose of due process — a major one.

vide an avenue of correction. Thus, due process protects individuals in two ways against arbitrariness that they would otherwise be powerless to combat.[17]

In what way does the market perform either of these functions? It is not obvious that it does. Professor Terrell suggests that the market provides balance between individuals and government, and that this is the crucial feature that makes due process superfluous.[18] But what does that mean in this context?

One idea of a balance of power, especially in the market scenario envisioned by Professor Terrell, is that it ensures a fair bargain. It is reasonable to think, so the argument goes, that one party cannot take advantage of another if the situation is balanced within some parameters of equality of bargaining power. Neither party can afford to be arbitrary because a balance of power makes arbitrariness irrational. If the situation is balanced, and one party is arbitrary, the other will withdraw and the deal will collapse. No external constraint, like due process, is needed because the situation is such that each party can look out for itself. This is the situation envisioned by Professor Terrell, and as he rightly points out, it is a situation that provides and implies maximum individual liberty and responsibility.

But is this a helpful or accurate way to represent the situation faced by Roth, Kennedy, or Bishop? Not with regard to the prevention of governmental arbitrariness. Imagine the worst case that should be the easiest case for Professor Terrell's market theory to handle. Suppose officer Bishop, a typical policeman in an ordinary police department in a mid-sized town, was dismissed because of a personal vendetta on the part of a superior. Remember due process is not needed here because the market is "an effective, extra-constitutional constraint [that] operates on government to make the protection of due process unnecessary . . . ."

Do we have any reason to think that Bishop's surly supervisor will not act out his personal vendetta because the market will constrain him from doing so? Not in the case we know about, and not in most ordinary cases we could imagine. How about arbitrary error such as negligent administration? Will the market act as a constraint. It will in some cases but not in Bishop's, Roth's or Kennedy's. The question is when will it? When will the market constrain governmental arbitrari-

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17. This is not to claim that prevention of arbitrariness is the only function of due process, but to suppose with Professor Terrell that it is one important function insofar as it relates to fairness.

18. Terrell, *supra* note 1.

ness in a way that would fulfill the purpose of due process as just discussed? It will do so whenever it is especially difficult, costly, or inefficient to replace an employee. This could be due to either of two factors. First, the employee could be personally unique, highly specialized, and difficult to replace. Second, there could be a general shortage of employees. If the government agency is a buyer in a seller's market, then the market is likely to constrain arbitrariness as irrational or inefficient, but not otherwise. If the market situation makes employees interchangeable or easily replaced, there is no reason to think that the market will constrain arbitrariness with regard to them.

The point is that the function and aim of a market is fundamentally different from the function and aim of due process. The aim of a market is efficiency, productivity. The aim of due process is fairness. Both are important, but they have little in common, especially if fairness is construed as protection against arbitrary governmental action. Most commentators, including Professor Terrell, construe the fairness implicit in due process as protection against arbitrary governmental action. There simply is no reason to expect the market to serve that purpose. That is not the market's function.

We might think of a market as a machine: it makes things run; it makes things go. But by comparison, due process is more like a brake: it makes things stop, or at least slows them down. This is very inefficient, but sometimes it is necessary to stop. Sometimes we need a brake precisely to try to keep the powerful machine from running over people. That being the case, we should be very careful about describing a brake as a machine (even though it is possible).

Nevertheless, this shows that Professor Terrell is right. There is a set of cases in which the market functions like due process in preventing arbitrariness. However, it is a very small set of cases and it has two rather odd properties from a legal point of view.

If the market prevents arbitrariness, it will do so by making arbitrariness irrational and unproductive. Thus, if the market is effective in this regard there will never be a legal case because the market will preempt arbitrariness. This is the deterrence function. If the market serves the deterrence function, it has the odd consequences of eliminating legal cases by making arbitrariness irrational and against self interest. Thus, Professor Terrell is right that due process is unnecessary in cases where the market acts as a constraint on governmental arbitrariness. But if that is the case, having due process constraints available will not be costly, because it will virtually never be invoked. The market will deter arbitrariness as against self interest. That being the case, why not have due process available to address the rare case in which stupidity or raw emotion overrides the good sense instilled in rational beings by the market?

Of course, no institution works perfectly. Thus, even if the market deterred arbitrariness, some cases would still occur that require correction. On the correction side of the question, the market provides for correction of arbitrariness in those cases in which individuals are powerful enough to correct it themselves. It works in cases where there is actual leverage, real bargaining power. The market protects the strong, which is another odd property from the due process perspective. If due process should protect the weak, as well as the strong, then we must be cautious not to let the market trade the protection of the weak for the freedom of the strong, which, given its natural properties, is what we should expect a market to do. This point lines up with an observation made by several commentators[19] that the present approach of the Court seems to have the odd consequence of protecting those and only those who do not need protection; for example, only those who are already protected by contract or state law.

If we are sensitive about these problems, it is arguable that none of the cases Professor Terrell discusses falls in the set he delineates; that is, the set of cases in which the market constrains, the way due process would, the arbitrariness of government. But Professor Terrell thinks that *Board of Regents v. Roth*,[20] *Arnett v. Kennedy*,[21] and *Bishop v. Wood*[22] are all within market protection, and furthermore that *Cleveland Board of Education v. Loudermill*[23] ought to have been similarly considered.[24] Obviously, Professor Terrell is not looking at this matter in the way I have suggested. The reason for this difference is that despite his language to the contrary, Professor Terrell is not arguing for the prevention of governmental arbitrariness. On the contrary, he is arguing for the acceptance of governmental arbitrariness within permissible limits. Here is one way to interpret his argument.

Prevention of governmental arbitrariness is costly and inefficient. If the government enjoys a monopoly of power, preventing arbitrariness is worth the price because individuals have no choice but to deal with government in such circumstances. Thus, Professor Terrell declares pointedly, here the government must be fair.[25] But where indi-

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19. *See, e.g.*, MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE ch. 3 (1985); Rabin, *supra* note 3; Simon, *Economic Analysis of Liberty and Property: A Critique*, 57 U. COL. L. REV. 747 (1986).

20. 408 U.S. 564 (1972).

21. 416 U.S. 134 (1974).

22. 426 U.S. 342 (1976).

23. 470 U.S. 532 (1985).

24. Terrell, *supra* note 1, at 374.

25. *See* Terrell, *supra* note 1; *see Due Process*, *supra* note 2.

vidual choice exists, then government is just one actor in a market situation. In private enterprise employers do not have to be fair, at least not fairer than the market requires, so 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?

If that is the argument, the answer should be that the Constitution is intended to limit *government* power, to constrain *governmental* abuse, to protect individuals from improper *governmental* action. The fact that the Constitution leaves private individuals free to be as nasty to one another as they choose simply has no bearing on the issue. If anything, it suggests that private interactions should not be used as a standard by which to measure governmental conduct.

The argument that government should not be held to a higher standard of fairness is analogous to an argument used recently in a privacy case that involves a newspaper publisher.[26] The editor of the paper that broke the sensational but worthless story of the publisher's long forgotten past argued that the publisher should not receive special treatment. In essence, the point was that since newspapers regularly violate the privacy of ordinary non-media people they ought not treat one another any better. Therefore, they ought to violate the privacy of one another as well. Please let us be wary of such arguments, even if they sound a little like equal protection. The optimal method of implementing the purpose of due process cannot be to adopt the view that private parties are free to be arbitrary with one another, having no other protection than the market, therefore, the government should be free to be arbitrary in similar situations. Surely this was not Professor Terrell's intent, although it is suggested by some of his language. There must be, and is, another way to interpret his argument. However, this interpretation leads to a different worry.

Professor Terrell correctly notes that theory affects definition.[27] Professor Terrell says that he intends to explore the impact of his theoretical principles on the terminology, the words that comprise the due process clause.[28] This intention is an exciting and worthwhile project, but unfortunately, he does not get to it in this article. Nevertheless his point is well taken, and in fact, should be expanded. Theory not only affects terminology, it also affects the selection and

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26. *See Cases and Commentaries: A Publisher with a Past*, 2 J. MASS MEDIA ETHICS 81 (1986-87).

27. Terrell, *supra* note 1.

28. *Id.*

articulation of issues. Since Professor Terrell was unable to explore the impact of his theoretical approach on the terminology and issues, it will be helpful to touch on it here. It should illustrate the concern I have about the recent development of the theory in terms of the alienation of rights.

As Professor Terrell develops his theory, the metaphor of the market becomes more and more central to it. He becomes quite focused on the task of representing individual interaction with governmental agencies in terms of a vision of one-to-one free market negotiation that recognizes individual autonomy and responsibility. Professor Terrell points out, if due process restricts government, then it also restricts individual freedom. Why should individuals be restricted from voluntarily selling some procedural rights for economic advantage? In a market situation, people have meaningful choices. Participants should be free to make their own choices and take responsibility for them.[29] Thus, it is not that the market prevents governmental arbitrariness, but that it provides individuals with the option of not dealing with government. The fundamental issue then becomes the question of when rights should be alienable. When should the matter be one of individual choice?

The language of this rationale is pervasive. Let us explore just one example. In his analysis of *Loudermill*, Professor Terrell describes the contract of the employees as "including a waiver of a hearing." He then claims that the issue in *Loudermill*, and similar cases, is whether due process protection could be waived in advance by an individual in entitlement cases.[30] Of course, there was no explicit waiver in the sense that the security guard or the bus mechanic, the plaintiffs in *Loudermill*, signed a paper that said "I hereby waive my right to a pretermination hearing." That was not the situation. But the contract included explicit language that stated that no pretermination hearing would be provided, and the security guard and the bus mechanic accepted the contract. One reasonable way to describe that event is as a waiver.

The question is what does it do to describe it that way? It focuses the issues on the actions, choices, freedom, and responsibility of the individual who accepts the contract. And it suggests that this individual has a right that precedes the contract, or is implicit in it, which the individual gives up or exchanges for something else. Obviously it

29. *Id.* at 373-74.
30. *Id.*

cannot be the government contractor who waives the right; it must be the individual contractee who waives the right or else he does not have one. So this description focuses the issues on the individual. This is not the only way to describe the situation, nor to construe the basic issues. We could also describe the situation by focusing on the actions of the government employer. With this focus, the basic issue is, should the governmental agency have the total power to grant or deny a right to a pretermination hearing in an employment situation, or should the source and evaluation of the right reside elsewhere, such as with the courts? To describe the situation in this way is to focus on the nature, power, and action of the government and the nature of the right, rather than on the attributes of the individual.

Which of these constitutes a better description depends on the particular situation and on the purpose of describing it. Perhaps the ideal would be to use both. In any case, it seems to me that for purposes of due process analysis, all the cases discussed by Professor Terrell, certainly *Roth*, *Bishop*, *Arnett*, and *Loudermill* are better represented by the description that focuses on the government rather than the individual. That is, it is more important to focus on the character of the governmental agency, its action and scope of power, and on the nature of the right, than on the attributes of the individual involved in those cases.

Professor Terrell says, "[w]here government is merely one actor among several in an active, competitive market, then the individual has meaningful options among which to choose."[31] What are those meaningful options? The individual may decide to deal with government concerning the item involved, or to deal with some private alternative or a different governmental agency.[32] But it is worth asking again: what is the choice here? The choice is not whether to waive or not waive a due process right. The choice is whether or not to take the job. Without investigating the factual background of *Loudermill*, for example, it is reasonable to presume that the security guard and the bus mechanic did not negotiate the question of a pretermination hearing that their contracts eliminated. Would it be reasonable to think it would have done them any good to try? Such contracts are largely standardized. The question is not: Is this contractual condition acceptable to you? The question is: Would you like to sign this standard contract and take this job, or not sign the contract and leave

31. *Id.* at 372.
32. *Id.*

the job? Construing this situation as the waiver of a hearing is very questionable. The question of waiver of rights is inapposite unless such rights were in fact negotiable. To construe the situation as the sale of rights is highly misleading if such rights were not negotiated. The question is not whether one wishes or chooses to sell a right, but whether one has it in the first place.

Surely, Mr. Roth, Mr. Kennedy, and Mr. Bishop would be surprised to discover that what really happened in their cases was that they sold their rights. Not only did each of these men sell his right, but the way he sold it was by accepting his job. He sold his right to get his job! Does that suggest that in some abstract sense he might have retained his right by refusing the job? Such a consideration seems implausible, or at least useless. However, was there *any* way that any of them could have avoided selling or waiving the right? Could they have refused the government job and gone to private industry? Let us assume that was a real option, which is questionable, and that no due process right attached to it. They could not save their rights that way. If there is no viable way to 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.

Professor Terrell's use of a market metaphor is understandable. The market metaphor is a natural extension of the useful and enlightening monopoly metaphor used earlier. Nonetheless, this ever expanding metaphor has outgrown its usefulness. Professor Terrell provides a market description of the issues: the sale of rights. This generates a market problem: why shouldn't all rights be salable? For this problem he finds a market solution: rights should not be salable when they are incommensurable according to error cost analysis.[33]

This generates a number of other questions for anyone who is not committed to the economic analysis of constitutional law. For example, why should a vague but trivial right be protected by due process, but not a specific and important right?[34] Is it because there is some intrinsic connection between incommensurability and importance such that very important rights tend to be hard to assess? That may well be, but then why introduce the extra element of commensurability? Why not aim directly at the protection of important interests? One answer could

33. *Id.*at 385.

34. This line of objection is pursued in a somewhat different way in Simon, *supra* note 19.

be that it fits the theory nicely. But that merely shows that the problem can be stated in the terminology of the theory; it does not show that the theory is the best way to solve it.[35] It is hard to see how adding the element of commensurability clarifies the issues, much less the answers. It does show that they can be stated in more than one way. But why do that? The only reason I can see for doing that is to expand the metaphor. It paints a coherent picture. But a picture can be well-balanced, well-structured, coherent, and not be a good representation of the world.

Metaphors can be enlightening or misleading. Furthermore, a metaphor can start out enlightening and wind up misleading. It is fun to pursue a metaphor, especially a rich, interesting metaphor like the metaphor of the market. We can replace tired, boring terminology with exciting, new terminology like "monopoly rent" and "incommensurability." A rich, comprehensive metaphor structures the inquiry to which it applies. The more comprehensive the metaphor, the more it structures the inquiry. It paints a picture. That is how it can be enlightening. That is what makes it valuable. It is also what makes it dangerous.

In the heyday of Newtonian physics, everything was a clock. The universe was a clock. God was a clockmaker. Governments and businesses aspired or were urged to emulate clockwork. The essence of human thought was clocklike rationality. It was a very comprehensive metaphor. These days our metaphors are not so universal. We have two modern metaphors. Everything is either a market or a computer. Since the computer metaphor is the newcomer, we may all wait with baited breath for the next "big book" that will replace Richard Posner with the Computer Model of Law. In the meantime we will, no doubt, see many more proposals for market models of various legal institutions. They can be valuable, but they do have limits. I am only suggesting here that the limits be recognized.

Nothing I have had to say here is new, of course. The positivist approach and the market model of adjudication have been extensively discussed both separately and together. They have even been extensively discussed within the relatively specific context of entitlement cases since *Roth*. My remarks are merely generalizations of more

35. It is often a source of consternation for students (and others) when they discover that being able to translate a problem into a formal or technical language (whether formal logic, decision theory, or the calculus of economics) does not necessarily solve the problem. It merely restates it. That was certainly a big disappointment for me.

detailed and pointed criticisms made by many commentators,[36] among them Professors Mashaw,[37] Rabin,[38] Ely,[39] and Baker.[40] Many of their criticisms are well taken and must be confronted. I shall rely on common knowledge of some of these well known critiques to make my final point.

Professor Terrell has rightly pointed out that it is important not only to arrive at the right conclusions, but also to ask the right questions. It seems to me the most general and basic questions must be confronted at some point. Put baldly, the initial question is the following: Are you serious? Are you actually advocating that the technical disciplines of economics and linguistic analysis be utilized by the courts?

If you are not serious, then what is being urged is the use of metaphorical language by the courts. This is the option I have argued against. While metaphor can be useful, beneficial, and illuminating, the selection of particular metaphors must be made with care. Metaphors that rely on technical jargon, such as those constructed in the terminology of economics, and to some extent the jargon of linguistic analysis, are potentially misleading. Metaphors obfuscate because they create the illusion of technical expertise leading to judgmental certitude, when in fact, the technical expertise from which the certainty might arguably be derived is not even being employed. Thus, it is reasonable to suggest that the terminology of market analysis should not be used metaphorically by courts, at least in any way that misrepresents that such analysis has been employed. So if Professor Terrell's answer to the "are you serious" question is "no," then he should explain why courts should use this sort of metaphor in legal analysis.

However, this may well not be what Professor Terrell is advocating. His answer to the "are you serious" question may be "yes." We need more accuracy in judicial determinations. If that is his answer,

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36. *See, e.g.*, Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 405 (1977); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Tushnet, *The New Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; Van Alstyne, *Cracks in the New Property: Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

37. *See* Mashaw, *supra* note 19, at ch. 3.

38. *See* Rabin, *supra* note 3.

39. *See* J. ELY, *supra* note 9.

40. *See* Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986).

he faces a daunting array of critical questions, both practical and theoretical, posed by commentators such as those just named.

To provide just one example from among the many critics of the positivist and economic approaches to due process, chapter three of Professor Mashaw's analysis of due process in administrative law[41] is a sustained and devastating critique of a general view of the very model being proposed and refined by Professor Terrell. Professor Terrell has not yet addressed Mashaw's perceptive set of questions, but it is the right set of questions to ask of anyone defending a version of the Court's present posture. I shall not recount Professor Mashaw's very detailed and careful critique here, but only the thrust of his argument.

The actual use of error cost analysis on the part of courts 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. How is this process of information gathering, interpretation, and evaluation to be instituted, implemented, and financed? Professor Mashaw considers several possibilities, which by and large he ultimately rejects as unworkable. Suppose for the sake of argument that such information gathering and evaluation could be accomplished accurately, noting that the concept of accuracy becomes questionable or at least restricted and technical in this context. Even if feasible, the information gathering process necessary for accuracy would have to be highly intrusive. The Court has suggested that the information gathering process could be intrusive, searching, and careful, without the judgment or standard of review being intrusive.[42] Perhaps that is an answer; perhaps not. Finally, whether or not administrative accuracy can be achieved without judicial intrusiveness, the necessary evaluation appears to require a decisionmaking process that is inappropriate for a court. Why should courts second guess the social utility calculations of legislative or administrative agencies?

Professor Mashaw then notes that in fact the court's approach has not been intrusive either in judgment or in the acquisition of data.[43] But if that is the case, then how can the courts' decisions possibly be a check on accuracy? That suggests that the court is not engaged in actual critical analysis, but is only employing a metaphor. That is what

41. Mashaw, *supra* note 19, at ch. 3.

42. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), *cited in* Mashaw, *supra* note 19, at 140.

43. Mashaw, *supra* note 19, at 141.

I have argued against. The question Professor Terrell needs to answer is, how would adopting his methodology enable courts to handle critiques like mine on the one hand, and those like Professor Mashaw's on the other?

III. A Conclusion and a Suggestion

My comments regarding the market aspect of Professor Terrell's theory have been highly critical because I sincerely have serious doubts about approaching the issues this way. However, I am not suggesting that Professor Terrell abandon his project. On the contrary, it should be clear that my disagreement with Professor Terrell represents a general, longstanding, and ongoing dispute that embodies two different ways of looking at things. It is not the sort of debate that will be resolved one day by one side coming up with a proof that settles the argument once and for all by demonstrating that one side is true and the other false.

It appears to me that the best plausible hope is that these two points of view, having the capacity to be very polarized, might instead work toward achieving some reasonable ground of compromise. A virtue of Professor Terrell's theory is that it is rich, sensitive, and flexible enough to move in that direction. So, I am certainly not suggesting that Professor Terrell abandon his theory, not even the market model, but rather that he continue to develop it. There are numerous possibilities. I will mention just one, which would tend to assuage concerns like those I have expressed.

Professor Terrell suggests that in market situations the question of monopoly is a question of fact.[44] This turns out to be an all or nothing proposition. The government is a monopoly or it is not. If it is, the plaintiff gets everything. If it is not, the plaintiff gets nothing. Furthermore, it turns out that all the cases Professor Terrell considers that are not assistance programs are not monopolies. So one wonders whether anything else can be a monopoly. Can an employment situation, for example, ever involve a monopoly? Is this really a question of fact, or is it a bright line rule that has already been settled? If it really is a question of fact, how extreme must the situation be before it becomes a monopoly or in some other way implicates an incommensurable value?

I suggest that the analysis as it stands is too coarse to accommodate the concerns of critics who are worried about protecting individuals,

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44. Terrell, *supra* note 1.

or at least about accurately describing the features of the case. One way to accommodate such critics might be to develop a theory of reasonable choice, perhaps along the line of factors considered, for example, in duress cases. Is it reasonable to expect the individual in question to be able to make this kind of choice? What kind of a trade-off is it? What is at stake? And so forth. In any case, if Professor Terrell would like to accommodate these sorts of worries, he might do so by developing theoretical devices for taking his notion of meaningful choices seriously. Development of these theoretical devices would be perfectly compatible with his market theory. This is just one suggestion for one possible avenue of development. The richness of the theory provides many such options.