MAINTAINING PROCEDURAL PROTECTIONS FOR WELFARE RECIPIENTS: DEFINING PROPERTY FOR THE DUE PROCESS CLAUSE

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INTRODUCTION

Wisconsin's new welfare program requires recipients to periodically search for employment and to attend job training to the satisfaction of individual caseworkers. Caseworkers shall "determine satisfactory search efforts for unsubsidized employment for each participant on a case by case basis" and deny benefits to those who do not comply.[1]

Allowing caseworkers such broad discretion invites abuses of power and will cause some needy families to go without benefits for trivial violations of policy. On the other hand, such discretion may enable welfare programs to move people into working environments. A certain degree of flexibility in working with welfare recipients is necessary to provide the most effective assistance. No matter what amount of discretion is allowed to caseworkers, however, welfare recipients must be assured of certain procedural protections. Because welfare benefits are crucial for survival, individual recipients should be able to challenge the termination of benefits in an administrative hearing before the termination is effectuated.

The Supreme Court established the due process right of welfare recipients to pre-termination hearings in *Goldberg v. Kelly*.[2] After *Goldberg*, however, the Court determined that due process protections apply only to those government benefits to which people have a "legitimate claim of entitlement" under the applicable statute.[3] Recent changes in federal and state welfare law call into question the degree of entitlement held by welfare recipients in Wisconsin. These legislative changes end the statutory guarantee of welfare assistance to eligible recipients and arguably insulate the new welfare program from the requirements of the Due Process Clause.[4] Because Wisconsin's welfare system is often seen as a national

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1. Wisconsin Department of Workforce Development, *Final Draft of Rules*, #97-054,§ 12.16(1)-(4) (March 1997).

2. 397 U.S. 254, 267-8 (1970) (holding that welfare recipients were entitled to a hearing before their benefits could be terminated).

3. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

4. The Fourteenth Amendment states that "no State shall deprive any person of life, liberty, or property without the due process of law." U.S. CONST. amend, XIV, § 1. The

model, it is vital that we understand its possible implications on the procedural rights of recipients.

This paper analyzes the continued applicability of the Due Process Clause to welfare benefit decisions and, more broadly, explores the nature of our due process jurisprudence. I begin by outlining the current understanding of procedural due process and explain the procedural protections that were constitutionally mandated for recipients of assistance under Aid to Families with Dependent Children, the previous welfare system. I compare those with the procedural protections available to recipients under Wisconsin's new welfare program. I then analyze a due process challenge to Wisconsin's welfare program under the existing jurisprudence. With that hypothetical challenge as a backdrop, I trace the development of the current procedural due process jurisprudence and identify its limitations. I then review a recent case in which the Supreme Court held that the importance of the interest at stake must be considered when deciding if that interest is a "liberty" protected by the Due Process Clause. In Part VI, I argue that the Court should incorporate the importance of the benefit at issue when deciding whether it is "property" for the purposes of Due Process. The revision I propose will more accurately reflect the multiple values served by procedural due process. Finally, I define more explicitly my understanding of an improved due process jurisprudence and respond to some potential challenges.

I.
PROCEDURAL DUE PROCESS

The current test for determining whether a government action complies with the constitutional requirement of procedural due process[5] consists of two prongs. The initial prong seeks to determine whether there is a "life, liberty, or property" interest at stake so that due process scrutiny should be applied. If a protected interest is found, the Court goes on to determine the nature of the "process . . . due" to the plaintiff.[6] When governments wish to deprive people of protected interests, they must follow at least these mandated procedures.

A. What Constitutes a Protected "Property" Interest?

Two years after its decision in *Goldberg v. Kelly*[7] holding that welfare benefits constituted property for the purpose of the Due Process Clause,

Fifth Amendment provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. These amendments are both encompassed by the phrase "Due Process Clause".

5. *See generally,* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 663-768 (1988) (providing a thoughtful discussion of procedural due process).

6. Brock v. Roadway Express, Inc., 481 U.S. 252, 260 (1987) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

7. 397 U.S. 254 (1970).

the Supreme Court clarified its new approach to defining protected property interests. In *Board of Regents of State Colleges v. Roth*,[8] the Court held that the question of whether specific government benefits were property was answered by looking to the governing law or regulation. If, pursuant to such law, an individual had a "legitimate claim of entitlement" to that benefit, then she had a property right protected by the Due Process Clause.[9] Significantly, *Roth* stated that the correct inquiry did not look "to the 'weight' but to the nature of the interest at stake."[10] In other words, not all grievous losses at the hand of government implicate the Due Process Clause. Applying the test to the facts before it, the Court held that the state university defendant had not violated the Due Process Clause when it refused to rehire the plaintiff without a hearing. Because the plaintiff had a one year contract and not tenure, he did not have a "legitimate claim of entitlement" in continued employment, and therefore did not have an interest protected by the Due Process Clause.[11]

Since *Roth*, the Supreme Court has used the "entitlement test" in a number of cases to determine if the plaintiff is indeed claiming a protected property interest. The Court applied the test to persons terminated from government jobs,[12] families cut off from utility services,[13] and denied government-funded assistance benefits.[14] When applying the entitlement test to government assistance benefits, courts have focused on the degree of discretion afforded the agency granting the benefits. If the applicable statute allowed the agency significant discretion in rejecting or terminating benefits, the recipient had no legitimate expectation of benefits and thus no protected interest. If the agency's discretion was limited in a significant way, then the recipient had a protected interest and the right to due process protections.[15]

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8. 408 U.S. 564 (1972).

9. *Id.* at 577.

10. *Id.* at 570 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

11. *Id.* at 578.

12. *See, e.g.,* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1984) (holding that a civil service employee was entitled to procedural protections before being fired since state law specified that such employees could be terminated only for "cause," which created an entitlement in continued employment).

13. *See* Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1975) (holding that because state law allowed termination of utility services only for "good cause," recipients had an entitlement and therefore a protected interest in receiving such service).

14. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that recipients of social security disability benefits protected by due process because eligible persons had a statutory entitlement to receive the benefits).

15. *See* Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, 30 Clearinghouse Rev. 97, 104 (1996) (stating that under *Roth*, a "critical inquiry in determining the applicability of due process guarantees will be whether the state program is rule based or discretionary"). See *infra*, Section III, for a complete discussion of this analysis and examples from case law.

B. *If a Protected Interest is Threatened, What Process is Due?*

The procedural protections that the government is constitutionally required to provide an individual who is threatened with the deprivation of a protected interest are determined by a three-part test, established by the Supreme Court in *Mathews v. Eldridge.*[16] A court applying the *Mathews* test must balance (1) the private interest that is affected by the government action, (2) the risk of error under the current procedures and the likelihood that increased procedural protections will improve the accuracy of the decisions that are made, and (3) the government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[17]

A central goal of procedural due process is to provide the individual with an "opportunity to be heard at a meaningful time and in a meaningful manner."[18] To ensure this goal, due process usually requires notice to the individual before she suffers a deprivation, a chance to review the evidence or claims against her, and an opportunity to contest the decision in some kind of hearing.[19] Whether the hearing must take place before or after the deprivation and the degree of formality required in the hearing depend on the court's balancing of the *Mathews* factors. While many situations require that some opportunity to contest the decision be available before any deprivation, a full evidentiary hearing is not usually required until after the deprivation.[20]

II.
WELFARE SYSTEMS, PAST AND PRESENT

A. *The Past: AFDC and* Goldberg v. Kelly

Until October 1996, the United States cash assistance program for poor families was Aid to Families with Dependent Children (AFDC).

16. *Mathews*, 424 U.S. 319.

17. *Id.* at 335. Despite the Court's focus on the financial interests of the government in *Mathews*, the government's interest will vary depending on the nature of the property at stake and the requested procedure. While the government has an interest in keeping administrative costs to a minimum, it also has an interest in reaching the correct decision and in ensuring that individuals are not arbitrarily deprived of their property. Goldberg v. Kelly, 397 U.S. 254, 266 (1970). *See also,* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 592 (1972) (Marshall, J., dissenting) (arguing that the government's interest in affording due process was aligned with the individual's interest in receiving fair procedures); Morawetz, *supra,* note 15, at 101.

18. *Mathews*, 424 U.S. at 333.

19. Brock v. Roadway Express, Inc., 481, U.S. 252 (1987); *See generally,* Stephen N. Subrin and A. Richard Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 Harv.Civ.Rts.-Civ.Lib.L.Rev. 449 (1974) (chronicling the basic elements of procedural due process which include notice, an opportunity to contest, to present witnesses, and to have an unbiased tribunal).

20. *See* Mathews, 424 U.S. at 249 (finding that due process does not require an evidentiary hearing prior to termination of disability benefits).

Under AFDC, the Federal Government provided money to states to administer the cash assistance programs locally. States which accepted federal AFDC funds were required to provide cash assistance to all families that met certain eligibility criteria.[21] Because of this requirement, AFDC was an entitlement program.[22]

Decided before both *Roth*[23] and *Mathews*,[24] *Goldberg v. Kelly*[25] held that prior to terminating AFDC benefits, due process required the New York City Department of Social Services to provide the recipient with a hearing at which she could challenge the termination.[26] The Supreme Court thus held that welfare benefits were property protected by the Due Process Clause. The Court did not discuss this part of the holding in much depth but relied on the recipients' statutory entitlement to welfare assistance as sufficient to establish a property interest in the continued receipt of those benefits.[27] In deciding what process was due, the Court emphasized that recipients were in "brutal need"[28] of AFDC benefits and were necessarily destitute without them. The Court recognized that welfare recipients' need for procedural protections was distinct from that of other categories of citizens. As the Court wrote, "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate."[29] The importance of the benefit to the individual recipients thus convinced the Court that New York City's existing, post-termination hearing process was inadequate.[30]

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21. 42 U.S.C. § 602(b) (1994).

22. The word entitlement should not be misunderstood. No individual family ever had a lifetime guarantee of receiving welfare. Federal entitlement meant that families who met prescribed eligibility requirements were entitled under law to receive AFDC assistance. States could not, absent specific federal permission, add additional eligibility requirements or deny eligible families welfare assistance. *See* King v. Smith, 392 U.S. 309, 317 (1968) (finding AFDC required states to pay benefits to eligible families and that states could not add eligibility criteria).

23. 408 U.S. 564 (1972).

24. 424 U.S. 319 (1974).

25. 397 U.S. 254 (1970).

26. *Id.* at 264-65.

27. *Id.* at 262 n.8. The Court stated, "[it] may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'." Notably, New York City defendants did not dispute that welfare recipients had a protected property interest. They merely argued that the existing procedures were constitutionally sufficient. *Id.*

28. *Id.* at 261 (*citing* Kelly v. Wyman, 294 F.Supp 893, 899 (1968)).

29. *Id.* at 264.

30. *Id.* at 264-65.

B. The Present: The Personal Responsibility Act, TANF and Wisconsin Works

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996[31] (Personal Responsibility Act or PRA) eliminates the AFDC program and authorizes federal money for states in the form of block grants under a new program, Temporary Assistance for Needy Families (TANF). States are to use TANF money to assist poor families and foster self sufficiency.[32] Notably, under TANF state governments are not required to provide cash assistance to any set of families, and the Personal Responsibility Act specifically states that there is no entitlement to TANF benefits.[33] States therefore have more freedom to establish their own eligibility requirements.[34] In another change from AFDC, states are not explicitly required to grant TANF recipients pre-termination hearings. Instead, the Personal Responsibility Act requires that states provide the Federal Government with "an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process."[35] Notably, the appeal process is not required to occur before the termination of benefits.

While removing the entitlement to welfare assistance creates more freedom for state legislatures to set eligibility requirements, the Personal Responsibility Act also limits states' discretion in very significant ways. Most notably, the PRA prohibits states from providing cash assistance to any single family for longer than sixty months.[36] In addition, the new law requires that states have a certain percentage of their TANF recipients participate in work activities or those states will face financial penalties.[37]

Wisconsin has taken a leading role in shaping the debate over welfare reform. Using waivers[38] previously obtained from AFDC mandates and enjoying even fewer federal constraints under TANF, Wisconsin has made

31. Social Security Act § 401- § 419, *as amended by* the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [hereinafter Personal Responsibility Act], Pub. L. No. 104-193, 110 Stat. 2105 (1996).

32. Social Security Act § 401, *as amended by* Pub. L. No. 104-193, 103(a) (1996).

33. *Id.*

34. *See* Sylvia A. Law, *Ending Welfare as We Know It*, 49 Stanford L. Rev. 471, 486 (1997) (book review) (noting that nothing under TANF prevents states from denying aid to women with boyfriends or making other categorizations that would have been prohibited under AFDC).

35. Social Security Act § 402, *as amended by* Pub. L. No. 104-193, §103(a)(1)(iii) (1996).

36. Social Security Act § 408, *as amended by* Pub. L. No. 104-193, § 103(a) (1996). This section does set out exceptions to the sixty-month limitation on TANF benefits for persons who have suffered severe hardship, such as domestic abuse.

37. Social Security Act § 407, *as amended by* Pub. L. No, 104-193, § 103(a) (1996).

38. Under the AFDC program, states could request exemptions or waivers from having to comply with certain federal mandates. 42 U.S.C. § 1315 (1994). The Bush and Clinton Administrations approved waivers for 43 states, beginning the road to welfare reform that came to climax with the Personal Responsibility Act of 1996. *See* Mary R. Mannix, Henry

drastic changes in its welfare program, now called Wisconsin Works or W-2. Under the stewardship of Governor Tommy Thompson, W-2 was initiated in 1994 and implemented statewide in September 1997. W-2 is designed to minimize the assistance people receive from the state and ensure that every person receiving assistance is engaged in some kind of work activity.[39] Since it began implementing the W-2 program, Wisconsin has seen its welfare caseload drop by 70 percent.[40] While Wisconsin has not tracked what has happened to the thousands of people no longer receiving assistance, the caseload reduction is often cited as evidence of an incredible success. New York City Mayor Rudolph Giuliani recently hired the architect of Wisconsin's program, Jason Turner, to run the New York City welfare program.[41] Because the Wisconsin welfare program has achieved national recognition, it is important to try and understand its broader implications for recipients. The W-2 program provides an important case for testing the current viability of *Goldberg's* holding that welfare recipients have a protected interest in the continued receipt of their benefits.

I begin with a brief sketch of the program itself. The Wisconsin statute sets out four levels or rungs of assistance to be provided to poor families under the W-2 program and places recipients according to the work readiness of the custodial parent.[42] Those determined to be job ready do not receive any cash assistance but instead receive only job search assistance to obtain "Unsubsidized Employment."[43] Those with minimal barriers to private employment are assigned to "Trial Jobs," which are private sector positions in which the employer is partially subsidized by the state to hire the W-2 participant.[44] The participant must receive at least a minimum wage salary directly from the employer. Those who have more serious impediments to obtaining private employment are assigned to "Community Service" jobs and receive a flat grant from the state.[45] Finally, those with extremely severe barriers to employment are placed in the W-2 "Transitions" rung, where they engage in some flexible work activity in exchange for a monthly grant.[46]

A. Freedman, Marc Cohan, & Christopher Lamb, *Implementation of the Temporary Assistance For Needy Families Block Grant: An Overview*, 30 Clearinghouse Rev. 868, 893 (Jan.-Feb. 1997).

39. *See e.g.*, WISCONSIN DEPARTMENT OF WORKFORCE: DEVELOPMENT DIVISION OF ECONOMIC SUPPORT, ADMINISTRATOR'S MEMO SERIES No. 97, RE: W-2 POLICY I-2 (June 1997) (setting forth the goals of the W-2 program and the assumptions on which it lies) [hereinafter DWD POLICY DOCUMENT].

40. Jason DeParle, *Faith in a Moral Motive for Work: The Man Who Redesigned Welfare in Wisconsin Is Coming*, N.Y. Times, January 20, 1998, at B9.

41. *Id.*

42. Wis. Stat. § 49.147 (1995-96).

43. Wis. Stat. § 49.147(1)-(2) (1995-96).

44. Wis. Stat. § 49.147(3) (1995-96).

45. Wis. Stat. § 49.147(4) (Oct-1997).

46. Wis. Stat. § 49.147(5) (1995-96).

Wisconsin allows significant discretion to the administrators[47] of the W-2 program, both in accepting applicants to the program and in assigning those accepted to a particular rung of assistance. The statute sets out a list of mandatory eligibility criteria that applicants must meet before being approved for any W-2 assistance. Those criteria include parental status, income and asset limits, immigration status, and others.[48] The statute also provides that, "[t]he Department may promulgate rules establishing additional eligibility criteria and specifying how the eligibility criteria are to be administered."[49] While the governing Department of Workfare Development (DWD) has not yet added additional eligibility criteria, it is conceivable that it may do so.

More importantly, neither the statute nor the DWD's regulations specify how W-2 agencies are supposed to place individuals in the various rungs of assistance.[50] While DWD's recent Policy Document gives suggestions about what characteristics to look for,[51] the accompanying memorandum warns, "[t]he W-2 program, unlike AFDC, does not prescribe detailed practice. Rather, suggested practices and guidelines are provided. The W-2 policy often provides the what, not the how, on W-2 implementations."[52]

In addition to making drastic substantive changes in its welfare system, Wisconsin altered the procedures by which recipients can appeal agency decisions.[53] Under AFDC, federal law[54] and *Goldberg v. Kelly*[55] required states to provide pre-termination evidentiary hearings to allow recipients to challenge decisions to terminate or reduce benefits. Wisconsin has eliminated the right to such hearings. To current recipients of assistance,[56] Wisconsin offers the opportunity for a post-deprivation "Fact Finding Review"

47. *See*, Wis. Stat. § 49.143 (1995-96). The W-2 program is overseen statewide by the Wisconsin Department of Workforce Development. The State contracts with counties to administer the local W-2 programs.

48. Wis. Stat. § 49.145(2)-(3) (1995-96).

49. Wis. Stat. § 49.145(1) (1995-96).

50. *See e.g.*, Wis. Stat. § 49.147(b) (1995-96) (stating only that a "Wisconsin works agency shall give priority to placement in unsubsidized employment over placement [in other rungs of assistance]"). *See also*, Wisconsin Department of Workforce Development, *Final Draft of Rules* #97-054, § 12.16(1)(b) (March 1997) (repeating the statute's language almost verbatim).

51. *See, e.g.*, DWD POLICY DOCUMENT, note 39, at II-28 (giving the following examples of characteristics which agencies might consider in assessing whether a participant would be appropriate for the "job ready" category: "capable of working and willing attitude; has a steady and/or recent employment history; has an education or training background that allows the individual to be competitive for available jobs in the unsubsidized labor market").

52. Accompanying Memorandum to DWD Policy Document (June 1997).

53. *See*, Wis. Stat. § 49.152 (1995-96) (setting out the basic framework for appealing decisions of W-2 agencies).

54. 42 U.S.C. § 602(a)(4) (1994). *See also*, 45 C.F.R. § 205.10(a)(6)(i) (1996) (implementing regulations).

55. 397 U.S. 254, 264 (1970).

56. Applicants who are denied assistance under Wisconsin's new program can petition for a "Fact Finding Review" but, even if they win, cannot receive benefits retroactive to the

of certain adverse decisions.[57] This system is inconsistent with the requirements of *Goldberg v. Kelly* because it does not allow the recipient to contest the adverse determination before it is implemented.

III.
WHAT PROCEDURES MUST WISCONSIN PROVIDE UNDER THE CURRENT DUE PROCESS JURISPRUDENCE?

In this section I analyze a due process challenge[58] to the appellate procedure of Wisconsin Works. The most important question to be answered is whether Wisconsin welfare recipients have a protected interest in the continued receipt of their benefits. Only if a court finds that a protected interest exists will it find that Wisconsin Works must comply with the requirements of the Due Process Clause.

A. Is a Protected Interest Implicated?

Unless the Supreme Court holds that welfare benefits are protected by the Due Process Clause because of their vital importance to recipients' survival,[59] a due process challenge to Wisconsin's fair hearing system would be

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date of their application. *See,* DWD POLICY DOCUMENT, *supra* note 39, at IV-18. The Supreme Court has not ruled whether an applicant for a government entitlement benefit has a protected interest in that benefit, but the *Roth* analysis clearly supports such a right. *See* Daniels v. Woodbury Cty., 742 F.2d 1128, 1132 (8th Cir. 1984) (holding that applicants for general assistance program are protected by due process); *See also,* Morawetz, *supra* note 15, at 99 n.11; Tribe, *supra* note 5, at 690 n.37.

57. *See,* DWD POLICY DOCUMENT, *supra* note 39, at IV-18-22. "Fact Finding Reviews" are more informal than the fair hearings mandated under AFDC. For example, Wisconsin appellants do not have the right to cross examine the state representatives, a right specifically mandated by the Supreme Court in *Goldberg,* 397 U.S. at 270. It should be noted that W-2 participants who are not satisfied with the local agency's "Fact Finding Review" can petition for a "Departmental Review" with the State. However, the language concerning such "Departmental Reviews" suggests that they are mainly limited to an examination of the record from the "Fact Finding Review." The participant's benefits are not continued pending such a "Departmental Review." *See,* DWD POLICY DOCUMENT, *supra* note 39, at IV-21-22.

58. *See generally,* Laura C. Conway, *Will Procedural Due Process Survive After Aid To Families With Dependent Children Is Gone?,* 4 Geo. J. Fighting Poverty 209, 212-16 (suggesting that advocates look to state Administrative Procedure Acts, the federal and state TANF statutes, and the Due Process Clause as means of challenging the procedural aspects of new welfare programs).

59. The Supreme Court may choose not to subject basic subsistence benefits to the *Roth* entitlement test and rather treat them as a category sui generis deserving procedural protections. The Court would find support for such a holding in the strong language of *Goldberg,* 397 U.S. 254. Such language makes it almost unthinkable that the Court would uphold a welfare system in which no procedural protections were afforded to recipients. However, this would conflict with the oft repeated holding in *Roth* that the correct inquiry does not look "to the 'weight' but to the nature of the interest at stake". 408 U.S. 564, 570 (1972). The Court has specifically rejected the notion that the importance of the interest at stake would implicate the Due Process Clause in other contexts. *See,* Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (concerning a prisoner's right to parole). *But see,* discussion of Sandin v. Conner, 515 U.S. 472 (1995), *infra,* Section V (arguably modifying the holding in *Meachum).*

considered under the entitlement test set forth in *Roth* and its progeny. To show that they possess a property interest in the receipt of W-2 assistance, recipients would have to prove that they have a "legitimate claim of entitlement"[60] to those benefits. Under *Roth*, that expectation can only come from the specific mandates of the applicable law or regulation.[61] Wisconsin officials defending against the due process challenge would point to the Wisconsin statute which states that, "notwithstanding fulfillment of the eligibility requirements for any component of Wisconsin Works, an individual is not entitled to services or benefits under Wisconsin Works."[62] Defendants would also point out that the U.S. Congress inserted a similar provision into the Personal Responsibility Act, which states "[t]his part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."[63]

While the legislative statements of non-entitlement are evidence that there is no protected interest, it is unlikely that a court's entitlement analysis would end there.[64] If the applicable law creates a legitimate expectation of receiving benefits, governments cannot avoid compliance with the Due Process Clause by simply stating that no entitlement exists.[65] A court would, therefore, delve further into the Personal Responsibility Act and Wisconsin's W-2 program and see if recipients have legitimate reasons to expect that they are entitled to the benefits. If the state or federal regulations mandate that every person fitting certain eligibility requirements is to be provided with assistance, it is likely the court would hold that there is an entitlement, notwithstanding the disclaimers to the contrary.[66]

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60. *Roth*, 408 U.S. at 577.

61. *Id.*

62. Wis. Stat. § 49.141(4) (1995-96).

63. Social Security Act § 401(b), *as amended by* Pub. L. No. 104-193, § 103(a) (1996).

64. *See* Washington Legal Clinic For the Homeless v. Barry, 107 F.3d 32, 38 (D.C. Cir. 1997) (stating that the court "doubt[ed] that blanket 'no entitlement' disclaimers can by themselves strip entitlements from individuals in the face of statutes or regulations unequivocally conferring them, [however] the District's 'no entitlement' disclaimer reinforces our conclusion that the District of Columbia law. . .creates no constitutionally protected entitlement to emergency shelter); *See* also, Movers Warehouse, Inc. v. City of Little Canada, 71 F. 3d 716 (8th Cir. 1995) (holding that the legislature's statement of non-entitlement was evidence that weighed against the finding of a protected interest for a bingo hall owner whose gaming license was not renewed).

65. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-41 (1984) (holding that the plaintiff (a civil service employee) was entitled to the protections of the Due Process Clause). The State of Ohio argued that since state law had created his protected interest, state law could limit the procedural protections afforded. The Court specifically rejected this argument, partially overruling the plurality opinion in *Arnett v. Kennedy,* 416 U.S. 134, 152-54 (1974), which held that if the state law created the protected interest, it could also establish the process due for depriving someone of that interest. *Id.*

66. *See* Morawetz, *supra* note 15, at 107 (stating that since such "no entitlement" language serves no purpose other than limiting procedural rights, a court would arguably hold that it has no effect pursuant to the decision in *Loudermill*).

B. Arguments For and Against the Finding of an Entitlement

i. Is W-2 a Rule-Bound Program?

A court will review the specific requirements and language of Wisconsin's W-2 program to determine whether recipients of or applicants for cash assistance have the necessary legitimate expectation of entitlement to create a protected interest. Plaintiffs would argue that W-2 is a rule-bound program in which statutory mandates and eligibility criteria sufficiently cabin the discretionary power of the administrators and create a legitimate expectation of entitlement to cash benefits. Several courts have held that entitlements can be created by statutes which use mandatory language concerning the granting of benefits. In *Daniels v. Woodbury City*, the 8th Circuit held that the language of Iowa's general assistance statute, stating that counties "shall" provide for the relief of poor persons who met eligibility requirements, created a cognizable entitlement of receiving benefits for all eligible persons.[67] W-2 recipients would argue that the statutory language concerning W-2 is also mandatory. It provides that, "a Wisconsin Works agency shall administer a trial job program as part of its administration of the Wisconsin Works program to improve the employability of individuals who are not otherwise able to obtain unsubsidized employment."[68] Arguably, this language entitles a person who cannot find employment to a subsidized job as a part of the Trial Jobs category.

There are weaknesses with this argument, however. The statute goes on to say that Trial Jobs are for those "not otherwise able to obtain unsubsidized employment, as determined by the Wisconsin works agency."[69] The state has a strong argument that the statute allows the W-2 agencies to determine, in their discretion, who is eligible for subsidized employment. The Wisconsin Legislature failed to specify which W-2 participants are to be placed in which rung of assistance.[70] In addition, the statute allows the Department of Workforce Development to "promulgate rules establishing additional eligibility criteria and [specifying] how the eligibility criteria are to be administered."[71] The significant amount of discretion allowed to the W-2 administrators may destroy any legitimate expectation of entitlement

67. 742 F.2d 1128, 1132 (8th Cir. 1984). *See also* Griffith v. Detrich, 603 F.2d 118,121 (9th Cir. 1979) (holding that a state law specifying that all counties shall support "all incompetent, poor, indigent persons," along with a specific regulatory scheme, created a protected property interest in general assistance welfare benefits); *But see* Washington Legal Clinic for the Homeless, Inc. v. Barry, 107 F.3d 32, 36-38 (D.C. Cir. 1997) (holding that despite a statutory mandate that the District provide emergency shelter to eligible families, the fact that there was insufficient shelter space for all eligible and statutory discretion to choose among eligible families defeated any claim of entitlement).

68. Wis. Stat. § 49.147(3)(a) (1995-6).

69. Wis. Stat. § 49.147 (3)(a) (1995-6).

70. *See, supra* note 50 and accompanying text.

71. Wis. Stat. § 49.145(1) (1995-96).

to W-2 assistance.[72] It is useful to briefly consider the role discretion has played in due process challenges to other government assistance programs.

Several courts have looked at the degree of discretion afforded the administrative agencies when considering due process challenges to denials of assistance under Section 8 Housing subsidy programs.[73] Courts considering these challenges have focused on whether applicants for the subsidy had a protected interest in establishing eligibility.[74] In *Eidson v. Pierce*[75] the 7th Circuit held that applicants for government subsidized apartments had no protected interest because of the discretion that was left to the landlords in selecting the tenants. Since applicants could not prove at a hearing that they were entitled to a subsidized apartment, (because of the absence of regulations that sufficiently cabined the landlords' choices of which families were to receive the benefits), they could not claim a "legitimate expectation of entitlement."[76] The Ninth Circuit reached a different result in *Ressler v. Pierce.*[77] That Court found that while the regulations similarly did not dictate which family would receive housing subsidies, the legislature had significantly restricted the agency's discretion in choosing recipients; thus a protected property interest existed.[78] Both courts agreed that the question of entitlement to government-funded benefits depended on the degree of discretion afforded the administrators in running the programs, although they differed on what level of discretion was necessary to defeat a claim of entitlement.[79]

72. *See, e.g., Washington Legal Clinic for the Homeless,* 107 F.3d at 36-38 (holding that homeless families did not have a protected interest in the receipt of emergency housing, despite the fact that the city had extensive regulations instituting an eligibility system and an routinized mechanism for distributing the limited shelter space). The D.C. Circuit held that because the system of distributing shelter to eligible families was not statutorily mandated and therefore discretionary, combined with the legislature's statement of non-entitlement to emergency shelter, a finding of a protected property interest was therefore prohibited. *Id.*

73. Section 8 is a federal housing program which, among other things, provides subsides to low income individuals in private housing. *See* 42 U.S.C.A. § 1437(f) et seq. (West 1998).

74. *See* Morawetz, *supra* note 15, at 104-105.

75. 745 F.2d 453 (7th Cir. 1984).

76. *Id.* at 459-60.

77. 692 F.2d 1212 (9th Cir. 1982).

78. *Id.* at 1215.

79. *See also*, Colson v. Sillman, 35 F.3d 106, 109 (2nd Cir. 1994) (holding that there was no protected interest in the continued receipt of state funded medical services for the physically handicapped because the statute allowed the commissioner to provide the services she determined was necessary, according to her judgement, and subject to appropriations by the legislature); *But see,* Law, *supra*, note 34 at 485 (emphasizing that even under AFDC there was much room for discretionary decision making and that did not defeat the finding of a protected interest).

ii. Is the Discretion Allowed by the Wisconsin Program Limited by the Requirements of Federal Law and Due Process?

Advocates for W-2 participants can argue that W-2 must be interpreted consistently with the requirements of Federal law. The Personal Responsibility Act limits the discretion permissible in state TANF programs. The PRA requires that the state programs "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment."[80] It is unclear, however, if the Administration for Children and Families (part of the Department of Health and Human Services) has the authority under the PRA to force states to comply with these requirements.[81] The PRA emphasizes the broad discretion allowed to states in developing and administering TANF programs. For example, the PRA states that TANF funds can be used "in any manner . . . reasonably calculated to accomplish the purpose of this part."[82] The extent of federal oversight in the TANF era was perhaps exemplified when the Administration approved Michigan's TANF program while noting that particular provisions of the program appeared to violate Due Process.[83] In its letter certifying Michigan for federal funds, the Administration merely urged Michigan to comply with constitutional requirements.[84]

If the PRA fails to limit the amount of discretion in TANF programs, then that discretion may be restricted by the Due Process Clause. A line of case law exists, beginning with *Holmes v. New York City Housing Authority*,[85] holding that government assistance programs must develop and follow "ascertainable standards" of eligibility and administration.[86] Several other federal appellate courts followed *Holmes* and ordered administrators

80. Social Security Act § 402(1)(B)(iii), *as amended by* Pub. L. No. 104-193, § 103(a) (1996). A similar claim can be made if the Department of Workforce Development unfairly changes the eligibility criteria for the W-2 program, for which it apparently has state permission. *See*, Wis. Stat. § 49.145(1) (1995-96).

81. While under AFDC law, states were denied matching federal funding for failing to comply with federal requirements, under TANF the federal role is limited to ensuring that the states have provided the required information to the Department of Health and Human Services. *See,* Mannix, Freedman, Cohan, & Lamb, *supra,* note 38, at 871 (citing Social Security Act § 402, as *amended by* Pub. L. No. 104-193, § 103(a) (1995-96)).

82. Social Security Act § 404(a)(1), *as amended by* Pub. L. No. 104-193, § 103(a) (1995-96).

83. Michigan's TANF program stated that it was eliminating the right to prior notice before terminating or reducing benefits. *See* Mannix, Freedman, Cohan, & Lamb., *supra,* note 38, at 872.

84. *Id.*

85. 398 F.2d 262 (2nd Cir. 1968) (holding that because of the likelihood of arbitrariness and favoritism, the Due Process Clause required the Housing Authority to develop and publish ascertainable standards for processing applications to public housing).

86. It should be noted that prior to *Holmes*, a fairly sophisticated body of law developed requiring governments to develop "ascertainable standards" in the areas of criminal law and restrictions on speech. *See* Anthony Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

of state-funded welfare programs to establish clear rules.[87] Wisconsin is required to implement W-2 in a way that complies with due process, and it thus must avoid any standardless discretion. More explicit standards of eligibility would increase the likelihood that courts would find an entitlement. A finding of entitlement means that the procedures for denying or eliminating W-2 benefits must conform with procedural due process.

Despite the logical appeal of requiring that government assistance programs follow standardized eligibility criteria, the *Holmes* line of cases has been questioned.[88] In *Eidson v. Pierce,*[89] the 7th Circuit held that the legislature's failure to establish ascertainable standards was evidence of legislative intent against creating an entitlement and was to be respected by the Court. Finally, in *Pension Benefit Guaranty Corp. v. LTV Corp,*[90] the Supreme Court questioned the notion that all government agencies are required to develop ascertainable standards.[91]

C. *What Process is Due?*

Should a court find that Wisconsin's W-2 program creates an entitlement to cash assistance or subsidized employment and that recipients therefore have a protected interest, the court would then be forced to decide if the existing procedures are constitutionally sufficient. The additional procedures requested by plaintiffs would be analyzed under the three part test established in *Mathews v. Eldridge.*[92] Relying on *Goldberg*

87. *See,* White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (holding that the Due Process Clause required the City of Champaign to establish written standards of eligibility for state funded General Assistance benefits and insure that those standards were fairly and consistently applied, even though the state legislature had not specified any such requirement); *see also,* Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (due process requires "at least that the assistance programs be administered in such a way as to insure fairness and avoid the risk of arbitrary decision making. . . .Typically this requirement is met through the adoption and implementation of ascertainable standards of eligibility").

88. *See,* Phelps v. Housing Auth. of Woodruff, 742 F.2d 816, 822-23 (4th Cir. 1984) (specifically disagreeing with *Holmes* and holding that pursuant to *Roth,* due process protections did not apply to applicants of federally subsidized housing assistance when the regulations allowed for significant discretion). *See also,* Morawetz, *supra* note 15, at 104 n.43 (suggesting that the *Holmes* line of case law is inconsistent with the *Roth* entitlement analysis).

89. 745 F.2d 453 (7th Cir. 1984).

90. 496 U.S. 633 (1990).

91. *Id.* at 655-656. This case challenged the procedures by which a government insurance program could restore responsibility for paying ERISA retirement benefits to a company that had declared bankruptcy. The Court reversed the Second Circuit's holding that the agency's decision was arbitrary and capricious. Such a holding could not be sustained, the Court said, because there was no specific language in the statute concerning the specific procedures that the government agency had to follow.

92. 424 U.S. 319 (1976). *See, supra* notes 16-20 and accompanying text for a discussion of this decision.

v. Kelly,[93] plaintiffs would argue that Wisconsin's fair hearing system is constitutionally inadequate. The "brutal need"[94] welfare recipients have for their benefits has not decreased since 1970 and because of this need, plaintiffs would have persuasive arguments that Wisconsin must implement a more formal pre-deprivation hearing system.[95] The Court would also consider the likelihood that a pre-termination hearing system would result in more accurate decision making. The Court would balance the recipients' interests and the gains in accuracy against the extra cost incurred by the government in having pre-termination hearings.[96] In *Goldberg*, the Court emphasized that the state has an interest in providing benefits to eligible persons and found that the state's countervailing interest in avoiding additional costs was "clearly outweighed".[97]

IV.
THE DEVELOPMENT OF THE CURRENT DUE PROCESS JURISPRUDENCE AND ITS PROBLEMS

The preceding considerations of a Due Process challenge to Wisconsin's welfare appellate system point to difficulties advocates will face when challenging TANF programs. Whether or not courts find that Wisconsin's program is sufficiently discretionary to escape due process review, other states may develop TANF programs that afford additional discretion to the administrators.[98] Under the current due process jurisprudence it appears that if states delegate enough regulatory discretion to the governing agencies, no protected interest will be found.[99] This illuminates a limitation in the current understanding of the Due Process Clause. The entitlement theory allows legislatures too much power in defining the interests protected by due process. Due process scrutiny should not disappear simply because states afford discretion to their welfare administrators. One of the functions of due process should be to protect individuals from arbitrary government decisions when those decisions affect interests that are vital to the individual's survival.

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93. 397 U.S. 254 (1970).

94. *Id.* at 261 (citing Kelly v. Wyman, 294 F.Supp 893, 899 (1968)).

95. *See also* Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) (holding that Wisconsin's pre-judgement wage garnishment statute violated the Due Process Clause despite the fact that any erroneous depravation of wages would last only until trial and could be avoided by posting a pre-trial bond). This holding suggests that the Court considers any deprivation of income to be very serious.

96. *Mathews*, 424 U.S. at 335.

97. *Goldberg*, 397 U.S. at 266.

98. Such programs can be challenged on the grounds that excessive discretion violates the requirements of the Personal Responsibility Act and the Due Process Clause itself. *See, supra* notes 80-91 and accompanying text.

99. *See,* Meachum v. Fano, 427 U.S. 215, 225-8 (1976) (stating that if sufficient discretion was afforded prison administrators, prisoners had no protected interest in remaining in a minimum security as opposed to maximum security prison).

A. *Development of the Entitlement Theory*

Charles Reich persuasively developed the idea that government benefits were protected by the Due Process Clause.[100] Reich observed that government benefits, broadly defined, were becoming a larger source of wealth for United States citizens. Government contracts, professional licenses, franchises, and Social Security benefits were among the most important property interests an individual could possess.[101] When the government demanded conformity as a condition of receiving such benefits, it greatly infringed on people's individual liberties.[102] Reich argued that only by protecting government benefits as property could society ensure that individual freedoms would be respected.[103] This meant, inter alia, that government benefits should be distributed in accordance with procedural due process.[104] Reich emphasized that recipients of most government benefits enjoyed procedural protections. Those receiving welfare and other redistributive benefits were notable exceptions.[105] This lack of protection resulted in welfare recipients being subjected to invasive investigatory procedures, such as midnight raids to determine if there was a "man in the house."[106] Such invasive tactics would continue, Reich maintained, until courts recognized people's property rights in government benefits.[107]

The argument that government benefits should be protected has gained strength. In 1968 the Supreme Court struck down an Alabama statute that denied AFDC to women who were having ongoing sexual relations with a man.[108] The Court held that Alabama's regulations went beyond the eligibility criteria prescribed by the Federal Government and that the AFDC statute required states to provide assistance to eligible persons.[109] This holding established that individuals could use federal law and federal courts to invalidate state eligibility requirements. In 1970 the Supreme Court cited Reich as the primary support for its holding in *Goldberg v. Kelly* that welfare benefits were protected by the Due Process Clause.[110] As discussed earlier, *Goldberg* was followed by *Roth*,[111] and soon the entitlement test was firmly in place. It would be a mistake, however, to understand the Supreme Court's entitlement jurisprudence as a strict reading of

100. Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).
101. *Id.* at 735-38.
102. *Id.* at 747-64 (describing mandatory loyalty oaths for government employees and extensive investigations into the moral standing of applicants for Social Security and welfare).
103. *Id.* at 771-77.
104. *Id.* at 783-85.
105. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965).
106. *Id.* at 1246-50.
107. *Id.* at 1252-55.
108. King v. Smith, 392 U.S. 309 (1968).
109. *Id.* at 317-9, 329-31.
110. *Goldberg*, 397 U.S. at 262 n.8.
111. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

Reich. Reich believed that all important government benefits should be recognized as property and protected, not merely those benefits that were statutorily defined as entitlements.[112] Reich's broad notion of entitlement was a way for him to argue that important government benefits deserved procedural protection.

The Supreme Court's more restricted notion of entitlement must be explored. In *Roth* the Court explained that, "[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[113] The Court tried to limit the range of interests that were protected as property. It legitimized only those "expectations of entitlement" which stemmed from independent sources. But the Court went on to say, "It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[114] This suggested a broader recognition of entitlements, one tied into people's actual expectations. In a companion case to *Roth*, *Perry v. Sindermann*,[115] the Court held that a legitimate expectation of entitlement could arise from an unstated but mutually held understanding, in that case a de facto tenure system. It said that "property denotes a broad range of interests that are secured by 'existing rules or understandings'."[116] *Perry* thus recognized that people justifiably rely on benefits that are not specifically guaranteed by statute but rather are implicitly guaranteed, or customarily granted. As the entitlement analysis developed, however, the kind of evidence that could support a finding of protected interests was reduced from "existing rules or understandings" to "existing rules." The Supreme Court confirmed this development in *Bishop v. Wood*.[117] In *Bishop*, the Court considered whether a state employee was entitled to due process before his employment was terminated. The Court recognized that a state regulation providing that civil servants could be terminated only for cause appeared to create a legitimate expectation of entitlement in continued employment.[118] The Court held, however, that the employee had no protected interest because North Carolina courts had previously held that such regulatory protections were not sufficient for state employees to escape the "at will" status.[119] Thus, with *Bishop*, the Supreme Court stopped looking at the individual's actual expectation of entitlement,[120] or even at an objectively

112. Reich, *supra,* note 106, at 1255.
113. Roth, 408 U.S. at 577.
114. *Id.*
115. 408 U.S. 593 (1972).
116. *Perry*, 408 U.S. at 601 (citing *Roth*, 408 U.S. at 577).
117. 426 U.S. 341 (1976).
118. *Id.* at 345.
119. *Id.* at 345-46.
120. *Bishop* thus limited the holding in *Perry*. *See,* Tribe, *supra* note 5, at 696-97.

reasonable expectation. The state alone defined what constituted a "legitimate expectation of entitlement."

Following the precedent set by *Bishop*, a line of case law has created a regime under which states with the exact same civil service statutes are not governed by the same constitutionally mandated procedural protections.[121] It is troubling that the degree of federal constitutional rights one has is determined by that state's interpretation of the employment at will doctrine. An individual who is faced with a government decision that endangers his/her livelihood,[122] whether it be employment[123] or welfare benefits, should be constitutionally entitled to minimal procedural protections. The test for finding protected interests should thus be expanded to include an analysis of the importance of the benefit. This expansion would appropriately broaden the definition of "legitimate expectation of entitlement."[124]

B. The Limitations of the Current Entitlement Test

The Court's existing analysis undervalues the Due Process Clause. By focusing exclusively on state law to define protected property interests, the current approach leaves open the possibility that important benefits will be administered without procedural protections. This is inconsistent with the basic goals of due process, which include improving the accuracy of government decisions, creating fair administrative processes, and fostering values of participation and dignity.[125]

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121. *Compare,* McMammon v Indiana Dept. of Fin. Inst., 973 F.2d 1348 (7th Cir. 1992) (holding that an Indiana statute, specifying that employees could only be terminated for "cause", created a protected property interest); *with,* Hollister v. Forsythe, 22 F.3d 950 (9th Cir. 1994) (holding that a state employee who could be fired only for "just cause" had no protected interest in continued employment).

122. I am referring to government decisions which single out individuals for adverse treatment. Individual due process protections are less crucial when government decisions affect whole classes of people, such as when legislatures reduce welfare benefits across the board or eliminate entire agencies of government. In those situations, theoretically, the affected people have their opportunity to contest the decision in the political process. *See,* Atkins v. Parker, 472 U.S. 115 (1985) (denying a due process challenge to a statewide determination to reduce the level of food stamps, holding that the legislative determination provided all the process was due).

123. I do not believe that all government employees have a right to pre-termination hearings. Rather, I argue that certain employees should have the right to an explanation of the reasons for their termination. *See, infra* notes 181-206 and accompanying text. Probationary employees and high ranking politicians may be excepted from even these minimal procedural protections as they necessarily serve at the "will" of their superiors.

124. *See, infra,* notes 160-164 and accompanying text for a more detailed explanation of my proposal.

125. *See,* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (writing for the majority, Justice Marshall stated that there are two central concerns of procedural due process, the prevention of mistaken deprivations and the promotion of participation by those affected by the decisions). *See also,* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 51-2 (1976) (arguing that any due process jurisprudence should consider the goals of dignity, participation, and fairness).

With legislatures reforming welfare on every level, individual decisions concerning welfare recipients are becoming more complex. Rebecca Zietlow argues that the increased regulations, penalties, and difficulties of complying with the new welfare programs make factual determinations by the agencies more important than ever.[126] In Milwaukee, Wisconsin, approximately a third of W-2 participants were penalized each month in 1997, losing their entire grant for that month.[127] A number of those penalized were victims of computer failure.[128] With no right to pre-deprivation hearings, those erroneously penalized likely had to do without any assistance pending their "fact finding reviews." Preventing the wrongful termination of benefits is one important role of due process. That role is becoming even more important as decisions about welfare recipients are taking on an increasingly moral and punitive tone. In this climate, public officials and administrators will be tempted to shortcut welfare recipients' rights. This makes the enforcement of procedural protections vital.[129]

In *Joint Anti-Fascist Refugee Committee v. McGrath*,[130] Justice Frankfurter explained the various interests served by observing Procedural Due Process. He stated, "[t]he validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."[131] Frankfurter's intuition that people value fair process even beyond the outcome of their claim has been affirmed empirically by a number of investigations into the psychological effects of different procedures.[132] Two authors conclude that, "[t]he perception that one has had an opportunity to express oneself and to have one's views considered by someone in power plays a critical role in fairness judgements."[133]

A due process jurisprudence richer than that currently employed recognizes the intrinsic value of providing due process before taking actions

126. Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 Am. U. L. Rev. 1111 (1996).

127. Jason DeParle, *High Rate of Penalties Is Found In Delaware's Workfare Program*, N.Y. Times, January 10, 1998, at A7.

128. Jason DeParle, *Faith in a Moral Motive for Work: The Man Who Redesigned Welfare in Wisconsin Is Coming*, N.Y. Times, January 20, 1998, at B9.

129. *See,* Alan Houseman, *The Vitality of Goldberg v. Kelly To Welfare Advocacy in the 1990's,* 56 Brook. L. Rev. 831, 849 (1990) (noting the same phenomenon as Zietlow and predicting that procedural claims will become more and more important to recipients).

130. 341 U.S. 123 (1951).

131. *Id.* at 171 (Frankfurter, J., concurring).

132. E. Allen Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 209 (1988) (stating that "[t]hese studies have all found that procedural justice judgements affect the evaluation of authorities and institutions").

133. *Id.* at 106.

which adversely affect individuals' important interests. In *Goldberg,* the Supreme Court rightly observed that society has an interest in creating a system in which the indigent have some control over their lives.[134] The Court warned of the "societal malaise"[135] that would result from subjecting indigent people to arbitrary decision-making by administrative agencies.[136] For these reasons, providing due process protections to welfare recipients is crucial even when the program administrators have significant discretion in determining eligibility. Such protections will increase accurate decision making by adding an additional level of review and, more importantly, contribute to the recipients' sense of empowerment and belief that they have been treated fairly.

By allowing the state regulations to dictate when due process interests are implicated, the Supreme Court "has arguably abdicated a significant role"[137] in constitutional analysis. The dangerous implications of the Supreme Court's abdication of this constitutional role are seen in the hypothetical due process challenge to Wisconsin's new welfare program.[138] The

134. *Goldberg*, 397 U.S. at 265.

135. *Id.* It is no mere coincidence that the *Goldberg* decision was handed down a mere three years after the urban race riots of 1967.

136. William Simon argues that the limitation of *Goldberg v. Kelly* is that it did not result in increased fairness or respect in the day to day functioning of welfare agencies. While fair hearing systems can act as a check on arbitrary decisions, they have not improved the agencies overall and indeed have contributed to an increasingly bureaucratized and alienated work force. William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 Brook. L. Rev. 777, 784 (1990). *See also,* William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 Yale L. J. 1198 (1983). Simon may be correct that the "legalization of welfare," achieved in part by *Goldberg* and other litigation, contributed to the bureaucratization of welfare agencies and the alienation of the workforce. But it is difficult to argue that the rule based system is worse for recipients than before *Goldberg,* when recipients rights often depended on their relationship with the caseworkers. *See, e.g.*, Jerry Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 Va. L. Rev. 818 (chronicling the harassment of recipients, imposition of personal moral judgements, and threats to take away children). Joel Handler points out that increased routinization did not lead to similar dysfunctions in Social Security Offices. This suggests that a lack of funding, proper training, and respect for welfare employees is the major source of the problem recognized by Simon, rather than the "legalization of welfare". *See,* Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position of the Rule of Law,* 92 Yale L.J. 1270, 1272. *See generally*, Martha F. Davis, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT (1993) (providing an account of the goals and strategies of legal services lawyers in establishing welfare as an entitlement).

137. Tribe *supra*, note 5, at 677.

138. The dangers are also demonstrated in the liberty context by the decision in *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul,* the Court used the entitlement analysis to encroach on previously recognized protected interests, the interest in one's reputation. The Court held that posting a suspected shoplifter's picture on store windows by the local police department did not implicate a protected interest. Thus, the aggrieved plaintiff had no procedural rights to contest such an action, despite the fact that he had never been convicted of any crime. While *Paul* was the only case in which the Court used the *Roth* entitlement analysis to cut back on previously recognized protected interests and has been effectively limited, it acts as a warning of relying exclusively on such analysis. *See* Tribe, *supra* note 5, at 701-03 for a full discussion of *Paul v. Davis* and its implications.

entitlement test established in *Roth* does not ensure that due process protections will continue in the post AFDC, block grant world. An understanding of due process that does not ensure these protections is inconsistent with our constitutional goal of participatory democracy and the protection of rights.

C. *Problematic Incentives Created by the Entitlement Analysis.*

When determining whether government assistance benefits are a protected interest, courts using the entitlement test analyze the degree of discretion afforded to administrators of the programs. By focusing the analysis on the discretion that legislatures allow in the administration of their programs, courts create perverse incentives for state legislatures. States wishing to avoid due process scrutiny will be tempted to minimize regulation and maximize the discretionary power of the administrators even more than the legislatures would otherwise feel comfortable doing.[139] By creating such incentives, courts reduce the likelihood that government assistance programs will be administered in the fairest and most efficient way. In addition, procedural protections will vary from state to state. Some states will maintain extensive regulations and create protected interests in a whole host of benefits, while other states will be able to terminate receipt of the most critical support without following any constitutionally scrutinized measures. The Supreme Court recently recognized these problems in the area of prisoners' liberty interests, as is discussed in the next section.

V.
LESSONS FROM THE PRISONER/LIBERTY CONTEXT

The Due Process Clause jurisprudence of prisoners' liberty interests largely mirrored the jurisprudence of government conferred property interests in the 1970's and 80's.[140] In *Morissey v. Brewer*,[141] the Supreme Court held that the two-pronged analysis of procedural due process would be applied in the prisoner cases. First, the Court inquired whether state law created a protected interest.[142] If so, the challenged procedures would be

139. Of course states have countervailing incentives to ensure that appropriate assistance is provided to needy persons.

140. *See generally,* Scott F. Weisman, *Sandin v. Conner: Lowering The Boom On The Procedural Rights Of Prisoners*, 46 Am. U.L. Rev. 897 (1997) (tracing the development of the due process jurisprudence for prisoners and analyzing the implications of the Court's decision in *Sandin v. Conner*).

141. 408 U.S. 471 (1972).

142. *Id.* at 481. *See also,* Wolf v. McDonnell, 418 U.S. 539, 557-58 (1974) (citing the *Roth* test for determining liberty interests); Meachum v. Fano, 427 U.S. 215, 224 (1976) (stating that the "determining factor [if the interest is protected] is the nature of interest involved rather than its weight," citing *Roth*).

analyzed to determine whether they conformed with Due Process.[143] As the case law developed, the Court looked to the degree of discretion afforded to the prison administrator when deciding if the state law had created a protected interest.[144] The Court reasoned that if the regulations were specific, the prisoner had a right to be free from punishments if she or he did not engage in the prohibited behavior.

A. Sandin v. Conner- *A New Direction for Identifying Protected Interests.*

In *Sandin v. Conner,*[145] the Supreme Court strayed from a significant body of case law and held that in the context of incarcerated persons, liberty interests would have to meet an importance threshold to merit due process protection. In *Sandin*, the Court considered whether a Hawaiian prison violated plaintiff's procedural due process rights by sentencing him to 30 days in solitary confinement for interfering with a prison search.[146] At his sentencing hearing, prisoner Conner was not permitted to present witnesses on his own behalf.[147] This, he claimed, violated his due process rights. The 9th Circuit agreed, holding that the applicable state regulations contained mandatory language concerning the imposition of solitary confinement, thus creating a protected interest in avoiding such punishment.[148] The Supreme Court reversed this holding and ordered summary judgement to be entered for the state defendant. The Court held that the deprivation of state-created[149] liberty interests requires conformity with due process only if such depravation is an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[150] In Mr. Conner's case, the Court concluded, a thirty-day stint in solitary confinement did not constitute an "atypical and significant hardship."[151]

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143. *Morissey,* 408 U.S. at 481-83 (weighing parolee's interest in receiving hearings against the state's interest in efficient control of prisoners).

144. *See, e.g.,*Wolf v. McDonnell, 418 U.S. at 556-7 (holding that the state had created a protected liberty interest in maintaining one's accredited good time credits because, under the regulations, such credits could be taken away only if the prisoner committed an act of serious misconduct).

145. 515 U.S. 472 (1995).

146. *Id.* at 474-475.

147. *Id.*

148. Conner v. Sakai, 15 F.3d 1463, 1465-66 (1994), *rev'd sub nom.*, Sandin v. Conner, 515 U.S. 472 (1995).

149. Certain punishments, such as revocation of parole, implicate the Due Process Clause "directly", and are thus not dependent on state regulations. *See, e.g.,* Vitek v. Jones, 445 U.S. 480, 490-491 (1980) (holding that transfer of an inmate to a mental institution against his wishes must be done in compliance with due process requirements). Similarly, the Court has never suggested that traditionally protected forms of property such as cash, chattel, or land, are subject to the entitlement test of *Roth.*

150. *Sandin*, 515 U.S. at 484.

151. *Id.* at 486.

The Supreme Court identified several reasons for rejecting its previous exclusive emphasis on the state regulations. First, such an analysis discouraged states from drafting comprehensive correctional procedures that would otherwise be adopted in the best interests of the states and the prisoners.[152] States were in fact encouraged to "avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."[153] This created vast divergences between the constitutional rights of prisoners in different states. In addition, the Court said, the previous jurisprudence had resulted in the unacceptable situation where the day to day management of state prisons was evaluated by federal courts.[154]

B. Implications of Sandin *for the Property Context.*

Does *Sandin* mark a new way that the Court will identify interests protected by the Due Process Clause? The reasons given by the Court for looking at the weight of the deprivation in addition to the applicable state law are directly analogous to reasons offered for broadening the jurisprudence of identifying protected property interests.[155] These factors convinced the *Sandin* Court that reliance on the entitlement analysis is insufficient. It is therefore possible that *Sandin* signals a movement toward the test that I propose for the property context, one focusing on both the importance of the interest at stake and the degree of entitlement.[156] *Sandin* appears to require, however, that prisoners meet the importance threshold in addition to the state regulation requirement, rather than instead of that requirement,[157] as my proposal suggests. If this is the extent of *Sandin's* holding, however, the Court should recognize that it has done little to solve two of the problems it recognized. States will continue to have incentives to avoid regulating the more serious deprivations of prisoners' freedoms. As a result, prisoners' rights will continue to depend on the state in which they are incarcerated. The problems identified by the *Sandin* Court suggest that the importance of the interest at stake must play a primary role in the determination of whether that interest merits procedural protections. The incentives for states to avoid regulation will be lessened only when the Court recognizes that the importance of the benefit itself can implicate the Due Process Clause. The Court's discontent with the narrow

152. *Id.* at 490 (J. Ginsburg, dissenting).

153. *Id.*

154. *Id.*

155. *See, supra* Section IV(C).

156. *But see, Sandin*, 515 U.S. at 497-8 (Breyer, J., dissenting) (stating that the nature of this inquiry is different in the property and the liberty contexts).

157. *Sandin*, 515 U.S. at 483-4. The Court distinguishes between liberty interests that directly implicate the Due Process Clause and "state created liberty interests", which are created by specific state law and also impose a "significant hardship in relation to the ordinary incidents of prison life." This suggests that *Sandin* adds an importance threshold for plaintiffs to meet.

focus of the entitlement test, demonstrated by the holding in *Sandin,* suggests that important changes in the due process jurisprudence are possible.[158]

VI.
AN ALTERNATIVE WAY OF IDENTIFYING PROTECTED INTERESTS

The test established in *Roth*, that the governing law or regulation is the only means of determining if a protected interest exists, is incomplete. To exclude consideration of all other aspects of the benefit/interest in question unnecessarily limits the Court's range of analysis.

A. Benefits Important to Basic Sustenance and *Those Guaranteed by Statutory Entitlement should be Protected by the Due Process Clause.*

The Supreme Court recognized the important role of property when it said, "[i]t is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[159] Protecting government benefits which are statutory entitlements is only a first step toward fulfilling that role of property. To ensure procedural protection for those things upon which people rely, the Court should broaden the due process analysis. The best way to achieve this protection is to factor the importance of the benefit into the consideration of whether a protected interest is at stake. Any time a procedural challenge is made to a government benefit program,[160] the Court should consider both the degree of entitlement to the benefit and the interest of people in receiving the benefit and in receiving procedural protections. Those benefits that are sufficiently established as entitlements will continue to receive due process protections.[161] In addition, those benefits that directly affect people's basic sustenance would also merit the protection of procedural due process.[162] This would include welfare benefits,

158. *See* Morawetz, *supra* note 15, at 103 n.35 (noting *Sandin's* possible implications in the context of government benefits, she states, "[t]he critical question is whether *Sandin* signals an additional 'importance' test in due process cases or whether it leads to a reinterpretation of the initial threshold inquiry of whether due process interests are triggered."). *See also*, Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973 (1996) (arguing that *Sandin* is the first step in the total elimination of due process protection for the "new property").

159. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

160. My proposal is concerned only with government benefits or the "new property." Traditional forms of property are of course protected by the Due Process Clause.

161. I recognize that the continued use of the entitlement test will mean that due process rights will vary between states. While this is far from ideal, my test ensures that the most important benefits will be administered in conformity with the Due Process Clause in every state.

162. *See,* Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at 20 Years*, 56 Brook. L. Rev., 805 (1990) (asserting that in 1969, the development of the entitlement test was not a foregone conclusion). Plaintiffs in *Goldberg v. Kelly* considered advancing the claim that

food stamps, medical assistance,[163] housing assistance, and certain government employment. Low-level government jobs are essential benefits deserving procedural protection, particularly in light of welfare changes which end assistance for many categories of people, i.e., single adults and certain legal immigrants. Without a safety net of public assistance, retaining one's job will increasingly become necessary for survival in certain situations. Before terminating such jobs, governments should be required to provide legitimate reasons for the termination. The termination of high-level government employees, political appointees, and probationary employees would be exempted from even these rudimentary protections.

*B. A Consideration of the Importance of the Interest at Stake is Consistent with pre-*Roth *Case Law.*

Procedural due process jurisprudence before *Roth* often recognized that the importance of the interest a stake had a critical impact on whether procedural protections were necessary. In *Joint Anti-Fascist Refugee Committee v. McGrath,*[164] several concurring justices argued that the Attorney General's decision that a political group was "communist" violated the Due Process Clause because the group was not provided with advance notice nor an opportunity to challenge the designation.[165] This designation resulted in an automatic revocation of the group's fundraising permit and subjected them to increased government scrutiny.[166] Justice Frankfurter wrote eloquently about the role of the Due Process Clause. He asserted that due process protections were necessary in this situation, even though the interest was not easily recognizable as "property" or "liberty," because a person faced with a "grievous loss of any kind," at the hands of the government, was entitled to procedural protections.[167] The Supreme Court echoed this belief nineteen years later in *Goldberg v. Kelly.*[168] While the Court noted that welfare benefits were statutorily guaranteed to eligible

"when the state inflicts any serious injury on an individual, it must give a fair opportunity to learn what is going on and to object." *Id.* at 810-811.

163. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974) (invalidating a residency requirement for admission to public hospitals on equal protection grounds, stating "it is at least clear that medical care is as much a 'basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of government entitlements").

164. 341 U.S. 123 (1951).

165. *Id.* at 143 (Black, J., concurring) and at 165 (Frankfurter, J., concurring).

166. *Id.* at 158 (Frankfurter, J., concurring).

167. *Id.* at 168. (Frankfurter, J., concurring) ("This Court is not alone in recognizing that the right to be heard before being condemned to suffer a grievous loss of any kind. . .is a principle basic to our society"). Sylvia Law argues that under today's entitlement test, plaintiffs in *McGrath* would not have a protected interest. *See* Law, *supra,* note 162 at 813. This observation supports my belief in the inherent inadequacies of the entitlement test.

168. 397 U.S. 254 (1970).

applicants under AFDC, this was one of the first cases where such entitlement was sufficient to constitute a protected property interest. The Court's language suggested that the importance of the benefits at stake made their recognition of a property interest a great deal easier.[169]

A similar focus on the importance of the interest at stake permeates the Court's holdings that licenses are a protected interest. In two cases concerning professional licenses[170] and one regarding a driver's license,[171] the Court held that the deprivation of such had to conform with procedural due process. Regarding a driver's license the Court said, "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus . . . adjudicates important interests of the licensees. . . . [T]he licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."[172] Here is another example of the Court's focus on the importance of the benefit meriting constitutional protection.[173] This example highlights the limited ability of the entitlement test to identify all of the interests that deserve the protection of the Due Process Clause.

C. Post-Roth Decisions Looked to the Importance of the Interest.

Despite the rigid official adherence to the entitlement test set forth by *Roth* in 1972, the Supreme Court suggested in several subsequent cases that the importance of the interest at stake independently merited the protection of the Due Process Clause. In *Memphis Light, Gas & Water Division v. Craft,*[174] the Court held inadequate the procedural protections afforded to customers of utility services. Despite having difficulties in describing utility service as an entitlement defined by statute,[175] the Court held that the interest in receiving service was protected. Similarly, in *Goss v. Lopez,*[176] the Court decided that high school students had a protected property interest in avoiding short suspensions from school. The Court tried to fit the decision into the *Roth* entitlement test, but the relevant state law

169. *Id.* at 264 (stating that welfare benefits constitute the "very means" by which recipients live).

170. *See* Willner v. Committee on Character & Fitness, 373 U.S. 96, 103 (1963) (holding that due process entitled a rejected applicant to the New York State Bar Association to a hearing). *See also* Barry v. Barchi, 443 U.S. 55, 64 (1979) (holding that a suspension of horse trainer's license was done in accordance with the requirements of due process).

171. Bell v. Burson, 402 U.S. 535, 539 (1971).

172. *Id.*

173. *See* Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 407 (1977) (concluding that the Court's decisions in the license cases cannot be reconciled with a strict understanding of the entitlement test).

174. 436 U.S. 1, 14 (1978).

175. *Id.* at 11-12 (noting that "state law does not permit a public utility to terminate service 'at will'," and the state law in fact limited such terminations for "sufficient cause").

176. 419 U.S. 565, 572-573 (1975).

provided minimal guidance to the school districts concerning the imposition of suspensions.[177] The state provided no explicit regulations about when or how suspensions were to be carried out, and the schools themselves had not instituted guidelines to curb the discretion of the principals.[178] Thus in both *Goss* and *Memphis Light,* the Supreme Court had a difficult time defining the interests as entitlements. In both cases, the Court stressed the importance of the interest as demanding due process protections.[179] It is time for the Court to affirm its instinct to provide procedural protections for important benefits. The due process jurisprudence should be broadened to ensure protection to sustenance benefits in addition to entitlements.

VII.

CHALLENGES TO IMPLEMENTING AN IMPORTANCE ANALYSIS WHEN IDENTIFYING PROTECTED PROPERTY INTERESTS

One challenge to my understanding of the proper due process jurisprudence comes from those writers focused on the text of the Fifth and Fourteenth Amendments. These critics ask how a court can ignore the specifications of "life, liberty, or property" and require that all crucial government benefits be administered in compliance with due process.[180] It should be noted at the outset that this criticism can be made of the existing jurisprudence.[181] Moreover, my understanding seeks to define those words in a world that is radically different from that of 1868.[182] The contemporary vision of the proper role of government is exponentially larger than that of the drafters of the 14th Amendment. Our notions of property and liberty must be updated to consider this larger role that government plays

177. *Id.* at 567.

178. *Id.* at 567-568.

179. *See* Tribe, *supra,* note 5, at 700 (Characterizing *Goss* as a welcome departure from *Roth*'s formalism and applauding the Court's focus on the "intrinsic quality of due process"). *See also*, Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 432-433 (1993) (arguing that *Goss* and *Goldberg* reflect the existence of a judicially unenforceable constitutional right to minimum welfare). Sager states that while the judiciary cannot make all the decisions necessary to implement this right to minimum welfare and that the bulk of the constitutional duty is left to the legislature, the Court has a role in protecting individuals from the arbitrary deprivation of government benefits which ensure survival. *Id.*

180. *See* Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. Legal Stud. 3, 18 (1983) (stating that the framers of the Constitution would not have specified "life, liberty, and property" if they intended to establish a right to due process without regard to the substantive interest at stake).

181. Responding to Bell v. Burson, 402 U.S. 535 (1971), such critics might ask whether driver's licenses constitute "property" or "liberty".

182. *See,* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J. concurring) ("Due Process is perhaps the most majestic concept in the constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.").

in people's lives.[183] The Rehnquist Court's jurisprudence of the Fifth Amendment's Takings Clause[184] is a similar attempt at updating notions of property to take into account the various ways in which governments affect citizens.[185] A strictly historical or textual reading of the Constitution would have a difficult time with either my understanding of the Due Process Clause or the current takings jurisprudence.

Another objection to the idea of incorporating the importance of the benefit into the first prong on the due process analysis is the alleged lack of efficacy of providing procedural protections to applicants of benefits that are not entitlements. The Court in *Eidson* made such an argument. The Court held that since the housing assistance program in question lacked concrete directions for determining which among the eligible families were to receive the benefits, hearings to determine eligibility would be insignificant. Even if the appellant won her hearing, there would be no guarantee that she would receive any benefit.[186] In response, it should be recognized that even in programs that cannot serve all eligible persons, there is usually value in providing due process protections to enable applicants to prove their eligibility for the benefit. Proving eligibility to earn "a place on line" is a valuable, and therefore protectible, interest.[187] Moreover, even if the accuracy gains from such a hearing are not substantial, other important values are served. Due process enables the appellant an opportunity to explain her position, to understand why she is not eligible for the assistance, and to feel that there is some rationality in the system.

A similar argument is available for public employees. Some argue that if employees are terminable at will pursuant to the applicable law, ensuring their right to appeal before termination is a waste of time. Since the employer could not be forced to rehire the appellant based upon the outcome

183. *See, supra* Section IV(A), for Reich's belief in this argument.

184. The Fifth Amendment states, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

185. *See, e.g.,* Ruckelshaus v. Monsanto, 467 U.S. 986, 1003-04 (1984) (holding that industry trade secrets in environmental data are property and if "taken," require compensation); *see also,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (holding that the state's law, prohibiting development along a certain stretch of beach which resulted in plaintiff's inability to construct houses, constituted a taking).

186. Eidson v. Pierce, 745 F.2d 453, 459-60 (7th Cir. 1984). *See also,* White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976) (holding that the absence of specific eligibility standards "deprives any hearing. . .of its meaning and value as an opportunity for the plaintiffs to prove their qualifications for assistance").

187. *See* Morawetz, *supra* note 15, at 105 (noting that even the *Eidson* court cited approvingly to *Davis v. Ball Memorial Hospital Assoc.*, 640 F.2d 30, 39 (7th Cir. 1980)). In *Davis*, the Court held that hospital patients had a property interest in receiving benefits created by a certain federal law. The Court found that although there were insufficient benefits for all possible beneficiaries, the existence of a first come, first served rule on which to distribute the benefits was enough to create an expectation of entitlement. *But see,* Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32 (D.C. Cir. 1997) (holding that the interest in "a place on line" was not recognizable, at least where the legislature had not mandated that such a line would be used to distribute the limited benefits).

of a hearing, such hearings would not result in substantial gains in accuracy.[188] Recognizing this difficulty as at least partially true, Robert Rabin suggests that the right to hearings is not an essential procedural protection for government employees. Rabin argues that what is necessary is that such employees have the right to a reasoned explanation for their termination.[189] Such a requirement protects the dignity of the employees, thus serving one of the fundamental aims of due process.[190] Like Tribe[191] and Mashaw,[192] Rabin laments the Court's focus on gains in accuracy as the only goal of due process.[193] He argues that a recognition of other values served by due process would help create a regime in which more people have at least limited procedural rights.[194] Rabin helps us see that it is a mistake to view due process as an all or nothing decision. Courts need to be more willing to demand that government follow some procedures, even where pre-termination evidentiary hearings are not practicable.

A final objection to my proposal is that it would result in too many procedural rights, that government agencies would be unable to function with any degree of efficiency. My proposal would not result in a situation where every decision made by a welfare agency is subject to due process scrutiny. Only certain important decisions, such as the rejection of an application, the termination of assistance, or the substantial reduction[195] of benefits, would merit procedural protection. Other decisions would not be significantly important to people's sustenance to require procedural protections.[196] I trust that courts are capable of determining the importance of the benefit to recipients, partially because already they are doing it. Currently such a determination takes place in the second prong of the due process analysis, in the *Mathews* test.[197]

One of the goals of my proposal is to push courts into finding that more interests are protected by the Due Process Clause. This does not mean, however, that recipients of every protected benefit would be entitled to pre-deprivation evidentiary hearing. A second prong of the due process

188. *But see*, Board of Regents v. Roth, 564, 591-592 (1972) (Marshall, J., dissenting) (arguing that procedural protections will force employers to re-examine their decisions and motives and thus act as a check against terminations for improper reasons).

189. Robert L. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. Chi. L. Rev. 60 (1976).

190. *Id.* at 77-78.

191. *See* Tribe, *supra* note 5, at 677

192. *See* Mashaw, *supra* note 125, at 48.

193. *See* Rabin, *supra,* note 189, at 76 (noting that requiring the employer to provide reasons would increase the accuracy of decisions).

194. *Id.*

195. *But see* Nancy Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. Rev. L. & Soc. Change 565, 581-584 (1987-88) (stating that at minimal levels of benefits, even small reductions are incredibly important and may require pre-termination hearings).

196. Unless such decisions were protected because statutory mandates created an entitlement.

197. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

analysis should still be employed by courts, namely a more nuanced version of the *Mathews* test.[198] The determination of what procedural protections are constitutionally required must remain flexible. Due process requires different protections for different situations.[199] For example, the Court rightly decided in *Goss v. Lopez,*[200] that while students had a protected interest in avoiding suspensions, the only process due was advanced notice and an informal hearing.[201] In that case the Court merely protected the right to an "informal give and take,"[202] and did not require the creation of new bureaucracies.

A useful additional constraint on the due process protections constitutionally required is achieved by a limited use of the *Paratt* doctrine. In *Paratt v. Taylor*[203] the Supreme Court held that where a deprivation of property was the result of negligent "random and unauthorized" action by a state official, no due process violation had occurred.[204] The Court's decision was correct. When the due process claim does not challenge the adequacy of a state's procedures and when no improved procedures would have prevented the deprivation that occurred, the state's procedural fairness is not at issue.[205]

CONCLUSION

"Welfare, by meeting the basic demands of subsistence, can help bring within reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."[206] The moral force of my argument derives from the notion that people should not be

198. The *Mathews* balancing test is rightly criticized on the grounds that it underestimates the interest in fair procedures and overestimates the government's interest in containing costs. The test fails to recognize that the interest served by due process is not just in ensuring that the correct individuals receive benefits but also that the government treats people fairly and with dignity. The test should be expanded to include not just the interest of the individual but society's larger interest in having fair process. *See,* Mashaw, *supra,* note 125, at 48. *See also,* Tribe, *supra* note 5, at 717-18.

199. *See, e.g.,* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (stating "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation").

200. 419 U.S. 565 (1975).

201. *Id.* at 581.

202. *Id.* at 584.

203. 451 U.S. 527 (1981) (holding that a prisoner whose mail order hobby kit did not reach him in prison did not have a due process claim).

204. *Id.* at 541.

205. *See,* Daniels v. Williams, 474 U.S. 327 (1986) (rejecting a due process claim by a prisoner who injured himself when a prison official left a pillow on stairs). Justice Stevens, concurring, pointed out that no due process violation had occurred because no pre-deprivation hearing was possible and the fairness of state procedures were not challenged. *Id.* at 339 (Stevens, J., concurring). *But see,* Zinermon v. Burch, 494 U.S. 113 (1990) (holding that a state's procedures for admitting voluntary patients into psychiatric hospitals had to comply with due process, thus rejecting the state's *Paratt* argument and stating that where a deprivation is foreseeable and preventable, post-deprivation remedy is adequate).

206. Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

deprived of life-sustaining benefits without an opportunity to object. In an article written 28 years after his decision in *Goldberg*, Justice Brennan emphasized the importance of the suffering described by plaintiffs' briefs.[207] Brennan wrote that only by recognizing the human element of the due process claim could the Court decide that a pre-termination hearing was necessary.[208] That human element cannot be relegated to the second prong of the due process analysis, which decides the kind of procedure required. It must be considered up front, when deciding if a protected interest is at stake.

In the rush to reform welfare and put recipients to work, those who are judged ineligible are branded as undeserving of public support or even public sympathy. Legislatures and even a majority of the voting public may have decided that the poor are to blame for their condition, contrary to the Court's conclusion in *Goldberg*.[209] But it is precisely in unpopular times that the constitutional protections of the Due Process Clause are most important. As Tribe reminds us, the framers of the 5th and 14th Amendments decided to protect certain core interests from majority legislative intrusion.[210] Protecting the due process rights of underprivileged groups is a countermajoritarian role that the Court must play.

Courts considering procedural challenges to Wisconsin Works and other TANF programs would be well advised to avoid using a strict entitlement jurisprudence. Even if discretion is allowed to the administrators of programs, courts should find that due process requirements apply. Courts should employ a broader vision of property, one that incorporates the importance of the interest at stake, into decisions about the range of protected interests.

207. William J. Brennan, *Reason, Passion, and Progress of Law*, 10 Cardozo L. Rev. 3, 21 (1988).

208. *Id.* at 20.

209. *Goldberg*, 397 U.S. at 265 ("We have come to recognize that forces not within the control of the poor contribute to their poverty.").

210. *See,* Tribe *supra* note 5, at 718. *See also* Mashaw, *supra* note 125, at 49 (referring to "Bill of Rights protections meant to insure individual liberty in the face of contrary collective action").